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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MARY GADE, Director of the
Illinois Environmental Protection Agency,
Petitioner,
v.
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

May Illinois avoid the procedure for state participation expressly established by Congress in Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-668 (1988 and Supp. 1991), and enact "supplemental" state legislation which directly, clearly and substantially intrudes upon federal regulation of occupational safety and health merely by asserting a state legislative purpose which extends beyond the purposes of the federal enactment?

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NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

At issue in this case is the constitutionality of various provisions of two Illinois laws regulating the training and competency of some—but not all—hazardous waste workers in the State of Illinois.

Respondent, the National Solid Wastes Management Association ("NSWMA"), is a trade organization whose members include companies engaged in cleaning up hazardous wastes in both planned and emergency situations. These firms operate nationally and employ a variety of personnel, including crane and hoist operators and general laborers, who are trained and certified pursuant to the Hazardous Waste Operations and Emergency Response Standard (the "Final Rule") promulgated by the Occupational Safety and Health Administration ("OSHA").

NSWMA challenged the Illinois laws in December 1988 on the grounds that they violate the Supremacy and Commerce Clauses of the United States Constitution. Since training, certification and competency of hazardous waste workers are comprehensively addressed in the Final Rule, NSWMA contended that Illinois was precluded from regulating in this area without having in effect a state plan approved by the Secretary of Labor ("Secretary").

The District Court held that, because the Illinois laws purported to serve other purposes in addition to occupational health and safety, only a provision that training be conducted "within Illinois" was preempted. The Court of Appeals vacated the District Court decision, holding specifically that a requirement that hazardous waste crane and hoist operators provide a certified record of 4,000 hours of experience on such equipment was preempted because it directly, clearly and substantially relates to the OSHA standard. The case was remanded to the District Court for reconsideration of respondent's claims as to the other provisions of the Illinois laws. Illinois petitioned this Court for review of the Seventh Circuit's decision, and certiorari was granted on December 16, 1991.

Federal Occupational Health and Safety Regulation of Hazardous Waste Operations.

The Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499, § 126, 100 Stat. 1690 (1986) ("SARA") (codified at 29 U.S.C. § 655 note), directs the Secretary to promulgate standards pursuant to the Occupational Safety and Health Act, 29 U.S.C. §§ 651-668 (1988 and Supp. 1991) (the "OSH Act"), for the protection of hazardous waste workers engaged in planned and emergency operations. SARA requires that OSHA regulations address requirements for appropriate levels of training, 29 U.S.C. § 655 note at (b), and specifies further that the OSHA training standards for "general site" hazardous waste workers shall apply to equipment operators and general laborers, and shall include a minimum

of 40 hours of initial offsite instruction and a minimum of three days of actual supervised field experience. 29 U.S.C. § 655 note at (d). However, SARA directs that such initial training requirements are not to be applied to general site workers who have already received the equivalent of such training. *Id.* SARA also requires OSHA to provide for certification and enforcement of these training requirements. *Id.*

On December 19, 1986, the Department of Labor published an interim final rule, effective immediately, entitled "Hazardous Waste Operations and Emergency Response," 29 C.F.R. § 1910.120 (1991) (51 Fed. Reg. 45,654 (1986)) (the "Interim Final Rule"). The Interim Final Rule required that all hazardous waste employees be thoroughly trained in specific topics, receive the offsite instruction and field experience required by SARA, and be certified by their instructor as having completed the required training. Several provisions of the Interim Final Rule relied on the use of the "buddy system," which is a system of organizing employees wearing protective equipment into work groups that are able to observe each other's activities, communicate through hand signals and render quick assistance in the event of an emergency.

On August 10, 1987, a Notice of Proposed Rulemaking and public hearing was published in the Federal Register. 52 Fed. Reg. 29,620 (1987). Over 40 witnesses testified, and over 155 written comments, including comments from the International Union of Operating Engineers, were received. On March 6, 1989, less than two months before the hearing of this case in the district court, OSHA promulgated the Final Rule, which became effective March 6, 1990. 54 Fed. Reg. 9294 (1989).

The Final Rule introduced additional flexibility to ensure appropriate levels of training for the skills required in different waste operations. *See* 54 Fed. Reg. 9294, 9304-9305, 9309-9310 (1989). For example, for certain

workers who visit sites "only on occasion" or who are limited to work areas with hazardous exposures that are below permissible limits, the Final Rule replaced the 40-hour/3-day requirement with a requirement of 24 hours of training with one day of supervision. 54 Fed. Reg. 9294, 9304-9305 (1989); 29 C.F.R. 1910.120(e)(3)(ii); *see also* 29 C.F.R. § 1910.120(q)(4) ("[s]killed support personnel"); 29 C.F.R. § 1910.120(q)(5) ("specialist employees"). Furthermore, the Final Rule expanded specific criteria for training, certification and trainer qualification,[1] 54 Fed. Reg. 9294, 9305 (1989); 29 C.F.R. § 1910.120(e)(5)-(6), required specified annual refresher training, 29 C.F.R. § 1910.120(e)(8), added eight hours of specialized management training for supervisors, 29 C.F.R. § 1910.120(e)(4), and provided that documented equivalent "work experience," "academic training," and/or "training . . . from actual hazardous waste site work experience" would be accepted in lieu of the 40-hour initial training requirement on the condition that "site specific training" and appropriate field supervision are provided. 29 C.F.R. § 1910.120(e)(9).

The preamble to the Final Rule expressly provided that states "with occupational safety and health plans approved by OSHA under section 18 of the OSH Act . . . would not be preempted by this final regulation and would be able to address special, local conditions *within the framework provided by this performance oriented standard* while ensuring that their standards are at least as effective as the Federal standard." 54 Fed. Reg. 9294, 9316 (1989) (emphasis added). On the other hand, the preamble states that "Section 18 of the OSH Act also expresses Congress' clear intent to preempt state laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards."

[1] On January 26, 1990, OSHA published proposed rules to comply with an amendment to Section 126(d) of SARA directing the Secretary to provide for OSHA certification of hazardous waste training programs. 101 Stat. at 1329-198 (1987); 55 Fed. Reg. 28,728 (1990).

Id. at 9315. A "state can avoid preemption only if it submits, and obtains Federal OSHA approval of, a plan . . . ." *Id.*

Subsequent Illinois Regulation of Hazardous Waste Workers.

Illinois has never had in effect a state plan which was approved pursuant to Section 18. On August 23, 1988, nearly 20 months after the promulgation of the Interim Final Rule, the Governor of Illinois signed Public Act 85-1195, codified at Ill. Ann. Stat. ch. 111 (hereinafter "Ill. Stat."), para. 7701 *et seq.* (Smith-Hurd, 1978), which took effect on March 1, 1989.

Public Act 85-1195 includes two bills that were added by a conference committee appointed on June 28, 1988 and passed by both houses three days later: (1) the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act (the "Operators Act") and (2) the Hazardous Waste Laborers Licensing Act (the "Laborers Act"). Both the Operators Act and the Laborers Act (collectively, the "Illinois Acts") stated that their purpose was "to promote job safety and to protect life, limb and property." Ill. Stat. at paras. 7702, 7802.

The Operators Act requires that persons who operate certain equipment at hazardous waste facilities possess operator's licenses and that persons who assist in such operation possess apprentice's licenses, Ill. Stat. at para. 7704(a)-(b); the Laborers Act requires that persons performing general hazardous waste work possess laborer's licenses. Ill. Stat. at para. 7804(a).[2] Both laws require

[2] The Illinois licensing provisions do not apply to all workers handling substantial quantities of hazardous wastes. Rather, they are required only for workers at specific listed facilities, particularly contractors engaged in hazardous waste cleanup, who are also covered by the OSHA standard. Ill. Stat. at paras. 7704, 7804. Because the Illinois Acts do not apply to "voluntary clean-up sites" or "emergency response sites," they do not extend to all

a license applicant to provide a certified record of at least 40 hours of training conducted "within the State of Illinois," which has been approved by either the EPA or the Illinois Environmental Protection Agency ("IEPA"), *id.* at paras. 7705(c), 7706(c), 7805(c), to pass a written examination prescribed by the IEPA, *id.* at paras. 7705(e), 7706(d), 7805(d) and to pass an annual refresher course of at least eight hours of instruction, *id.* at paras. 7707(b), 7806(b).

In addition, the Operators Act requires applicants for an operator's license to submit a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours. Ill. Stat. at para. 7705(d). The Illinois Acts do not provide for the substitution of equivalent training or expertise for the certified records required.

The Illinois Acts impose fines for business offenses upon unlicensed workers, and fines for misdemeanors upon employers, contractors and agents who knowingly employ unlicensed workers, Ill. Stat. at paras. 7715(a)-(b), 7716(a)-(b), 7814(a)-(b). The Illinois Acts are administered by Licensing Boards consisting of representatives of the operating engineers union and the hazardous waste remediation and disposal industry, and one public member. *Id.* at paras. 7709, 7808.

The District Court Proceedings Below.

NSWMA filed a complaint in the U.S. District Court for the Northern District of Illinois on December 22, 1988, challenging the training and experience provisions

hazardous waste sites in Illinois that are covered by the OSHA standard. Ill. Stat. at paras. 7703(f), 7803(e). For reasons that are not apparent, neither the Operators Act nor the Laborers Act applies to operators of forklifts or bobcats handling hazardous waste. Ill. Stat. at paras. 7704(e), 7804(b). Nor do they apply to workers in certain industries, such as local manufacturing facilities, mining operations, agriculture, or railroads. *Id.* at para. 7703(e)-(f).

of the Illinois Acts on the grounds that they are preempted by the OSH Act and its regulations, and that they constitute an unreasonable burden on free commerce among the states. Illinois responded that the Illinois Acts were not preempted because they also served public safety and environmental purposes, and that the Commerce Clause challenge was premature.

The District Court found that NSWMA's members are required to train, qualify and certify their hazardous waste remediation workers in accordance with the Final Rule, which regulates, *inter alia*, training, field experience, annual refresher courses, and competency standards for equipment operators and laborers. (Pet. App. at 48.)[3] The court further concluded that the Illinois Acts regulate the same matters (and therefore the same employees) as the Final Rule. (Pet. App. at 49.)

The District Court held that the provision in the Illinois Acts requiring 40 hours of training *within Illinois* was preempted since there was not even a "scintilla (of a scintilla) of evidence" to show that compliance with the "within Illinois" provision will further either public safety or environmental protection. (Pet. App. at 57-58.) Illinois did not appeal this decision.

With respect to the 4,000-hour requirement of equipment operators, the District Court found that Illinois had introduced no evidence at trial that would arguably tend to show that this requirement would reduce the risk of danger to the public or employees or the environment. (Pet. App. at 19; 58-59.) Indeed, there was testimony that there was "some possibility" that the requirement

[3] References to the Appendix to the Petition for Certiorari are cited as (Pet. App. at —). References to the Appendix to this Brief are cited as (App. at —). References to the District Court Hearing Transcript, contained in the record below, are cited as (Tr. at —). References to the Brief for Petitioner are cited as (Pet. Br. at —).

would "increase such risk."[4] (Pet. App. at 50.) Nonetheless, the court reasoned that operators with 4,000 hours of experience on heavy lifting equipment would likely have fewer accidents and hence pose less risk to public safety and the environment. (Pet. App. at 59.) The court therefore concluded that the 4,000-hour requirement is not preempted. (*Id.*) The District Court also held that the Commerce Clause challenge was not ripe for adjudication since Illinois had not promulgated regulations. (*Id.* at 61.) NSWMA appealed to the Seventh Circuit.

The Decision of the United States Court of Appeals for the Seventh Circuit.

The Court of Appeals for the Seventh Circuit reversed and remanded. *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671 (7th Cir. 1990), *cert. granted sub. nom. Gade v. NSWMA*, 111 S. Ct. 2850 (1991). The court concluded that "section 18's express preemptive effect appears to be unambiguous," *id.* at 678, and therefore that Illinois may not promulgate occupational safety and health standards for hazardous waste workers. The court then rejected the "dual-purpose" preemption tests of other circuit courts and the district court, and instead applied a two-step inquiry. *Id.* at 679. First, does the challenged state law constitute, in a direct, clear and substantial way, regulation of worker health and safety? Second, if so, is it possible to sever from the state law provisions regulating worker health and safety? If severance is not possible, then the state law must be invalidated even if it serves a dual purpose. *Id.* at 679 & n.8. Applying this analysis, the court struck down the 4,000-hour requirement of the Operators Act, and remanded the case to the district court for reconsideration of the other challenged provisions in light of its decision. The court noted that other provisions might well duplicate or even conflict with the Final Rule. *Id.* at 679.

[4] The District Court recognized that the Illinois Acts "could result in increased risk" by diminishing "the pool of workers available to clean up hazardous waste sites" and that the Illinois training, certification, and experience requirements potentially "could frustrate an employer's attempt to respond to environmental emergencies" and "disrupt the operation of the federally-endorsed Buddy system" by "impairing employers from developing effective work groups" consisting of employees based in other states, some of whom are not qualified to be licensed in Illinois. (Pet. App. at 50-51.)

SUMMARY OF ARGUMENT

The OSH Act constitutes a carefully crafted charter for federal-state cooperation in fostering "safe and healthful working conditions." In the first instance, it directs OSHA to develop, issue and enforce urgently needed occupational safety and health standards for particular industries or work environments. In areas where such federal standards are not yet in effect, state governments are permitted, indeed encouraged, independently to promote occupational safety and health. But where a federal standard is in effect, states may regulate only pursuant to a state plan that is approved by the Secretary of Labor. Upon submission of a state plan, the Secretary works closely with the state to ensure that, in her judgment, the state standards are at least as effective as the federal standard and, in the case of products distributed in interstate commerce, the state standards are "required by compelling local conditions" and do not "unduly burden interstate commerce." Approved state plans are subject to a probationary period before federal enforcement is withdrawn, although federal oversight continues.

In short, Section 18 of the OSH Act presents states with two choices when a federal standard is in effect: either defer to federal regulation, or assume complete responsibility for regulating by obtaining federal approval of a state plan. Section 18 reflects Congress' judgment that it would be confusing and counterproductive to permit federal and state standards on a single issue to coexist.

The State of Illinois asserts that it has a third choice: to superimpose on existing federal standards selective,

additional state standards not part of a federally approved state plan. Illinois moreover has enacted its "supplemental" standards in an area of particular concern to Congress. SARA explicitly directed OSHA to issue, on an urgent basis, a comprehensive standard protecting the health and safety of workers in hazardous waste operations. SARA specified in unusual detail requirements for worker training, competency and certification that were soon thereafter incorporated into OSHA's Hazardous Waste Operations and Emergency Response Standard.

Illinois nevertheless contends that notwithstanding the existence of OSHA's national standard and the absence of an approved state plan, it should be free to enact piecemeal state standards that apply specifically and inflexibly to certain hazardous waste workers already protected by OSHA. Illinois also contends, apparently in the alternative, that its occupational safety and health standards are permissible because they purport to advance additional state legislative interests such as public safety and environmental protection. Both arguments must fail.

The express language, structure and purpose of the OSH Act demonstrate Congress' unmistakable intent to prohibit states from unilaterally "supplementing" a federal standard in the absence of an approved state plan. This has also been the consistent and often expressed interpretation of the agency charged with administering the law. In addition, the legislative history of Section 18 shows that Congress rejected language that would have expressly allowed states to supplement OSHA standards. The lower courts, including six federal circuit courts, have agreed, holding uniformly that Section 18 preempts such state regulation. The OSH Act expressly preserves certain state laws in Sections 4(b)(1), 4(b)(4) and 18(a). Section 18(a) in particular provides that states are free to regulate worker health and safety where *no* applicable federal standards exist. Section 18(b) establishes a process for states to assume responsibility

in areas where federal standards exist by submitting a state plan for approval by OSHA. Viewed in its entirety, Section 18 leaves no room for a state to tinker with a federal standard. The Illinois Acts contravene the express requirements of Section 18 and frustrate achievement of the full purposes and objectives of Congress to coordinate state and federal regulation of worker health and safety and to ensure efficient and effective enforcement.

The court below properly rejected Illinois' contention that because the Illinois Acts assert a non-occupational purpose, they are beyond the reach of federal preemption. In contrast to the other circuits that have addressed so-called "dual purpose" state regulation, the court below properly focused on the precise reach of Congress' intended preemption and the direct effect of the state statute on the operation of federal law, thereby avoiding an unbounded and ultimately irrelevant search for "legitimate" state legislative purposes or effects unconnected with the federal enactment. Under its test, subject to state law severability analysis, only those provisions that directly, clearly and substantially affect employee-employer obligations in the workplace would be invalidated. The court therefore preempted the Illinois requirement that a hazardous waste crane operator present a certified record of 4,000 hours of experience, and remanded the case for consideration of other provisions of the Illinois Acts that duplicate, supplement, frustrate, or even conflict with requirements of the OSHA standard.

Nothing in the preemption test applied by the court below precludes Illinois from exercising its traditional powers to license occupations or protect the environment. However, by enacting the regulatory statutes contested in this case, Illinois has chosen to achieve its purposes by intruding in a direct, clear and substantial manner upon an established scheme of federal regulation. Illinois may do so only within the framework expressly established by Congress in Section 18 of the OSH Act, namely the adoption of an approved state plan.

ARGUMENT

I. IN THE ABSENCE OF AN APPROVED STATE PLAN, SECTION 18 OF THE OSH ACT PREEMPTS REDUNDANT AND "SUPPLEMENTAL" STATE LEGISLATION.

Illinois' threshold argument raises a question that has never been resolved in Illinois' favor—whether Congress in the OSH Act intended to preempt states without approved state plans from enacting occupational health and safety legislation that duplicates and supplements a comprehensive OSHA standard. The court below stated that "[w]e have discovered no case contradicting the view that section 18 expressly prohibits states without federally approved state plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard." *Killian*, 918 F.2d 671, 678 (7th Cir. 1990).[5]

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[5] *See also Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991), *cert. denied*, 117 L. Ed. 2d 154, 1992 U.S. LEXIS 694; *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274, 278 (1st Cir. 1990); *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 55 (2d Cir. 1988); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 626, *opinion and judgment vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987); *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986), *appeal dismissed and cert. denied*, 484 U.S. 801 (1987); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989); *United Steelworkers of America, AFL-CIO-CLC v. Auchter*, 763 F.2d 728, 734 (3d Cir. 1985); *People v. Pymm*, 561 N.Y.S.2d 687, 694 (Ct. Ap. 1990), *cert. denied*, 111 S. Ct. 958 (1991); *New Jersey Chamber of Commerce v. State of New Jersey*, 653 F. Supp. 1453, 1462 (D.N.J. 1987); *AFL-CIO v. Marshall*, 570 F.2d 1030, 1037 n.22 (D.C. Cir. 1978); *Columbus Coated Fabrics v. Industrial Comm'n of Ohio*, 1 O.S.H. Cas. (BNA) 1361, 1363 (S.D. Ohio 1973); *People v. Hegedus*, 443 N.W.2d 127, 131 (Mich. 1989); *Thornock v. State*, 745 P.2d 324, 327 (Mont. 1987); *Lepore v. National Tool and Mfg. Co.*, 540 A.2d 1296, 1306 (App. Div. 1988), *aff'd*, 557 A.2d 1371, *cert. denied*, 493 U.S. 954 (1989); *Sabine Consolidated, Inc. v. State of Texas*, 756 S.W.2d 865 (Tex. Crim. App. 1988), *reversed on other grounds*, 806 S.W.2d 533 (Tex. Crim. App. 1991); *State ex rel. Cornellier v. Black*, 425 N.W.2d 21, 24 (Wis. 1988); *Stanislawski v. Industrial Comm'n*, 457 N.E.2d 399, 400 (Ill. 1983); *United Air Lines, Inc. v. Occupational Safety and Health Appeals Board*, 187 Cal. Rptr. 387, 394 (1982); *Five Migrant Farmworkers v. Hoffman*, 345 A.2d 378, 380 (N.J. Super. 1975).

Application of the Supremacy Clause, U.S. Constitution, Art. VI, cl. 2, "is guided by familiar and well-established principles." *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691, 698 (1984). First and foremost, "[p]reemption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990) (citation omitted).

In the absence of explicit statutory language, congressional intent may be implied from a pervasive "scheme of federal regulation. . . ." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), where compliance with both federal and state laws is physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

A. Section 18 Expresses Congress' Intent To Allow States to Enact Standards Such as the Illinois Acts Only Upon Approval of an Adequate State Plan.

Determining the intent of Congress "must begin with a statute's language," *Mallard v. U.S. Dist. Court for Southern District of Iowa*, 490 U.S. 296, 300 (1989), for there is a "'strong presumption'" that the "plain language of the statute expresses congressional intent." *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991); *cf. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). Here, that task is greatly simplified because Congress has expressly addressed the question of federal preemption of

state worker health and safety legislation in Section 18, 29 U.S.C. § 667.

Section 18 establishes "a scheme of administratively controlled preemption," Stephen Bokat & Horace Thompson III, *Occupational Safety and Health Law*, 681 (1988), that must be examined in its entirety. Section 18(a) expresses Congress' intent not to prevent states from enacting occupational health and safety laws in areas where OSHA has not promulgated standards. While Section 18(a) expressly authorizes states to regulate worker health and safety, it explicitly limits that authority to areas not subject to an OSHA standard. States are not, however, entirely powerless to regulate in areas subject to OSHA standards. Sections 18(b) and (c) establish a mechanism for states to assume administration, subject to federal approval and oversight, of occupational safety and health in those areas. If states wish to assume responsibility for developing standards "*relating to any occupational safety or health issue*" covered by an OSHA standard,[6] they "*shall* submit a state plan for the development of such standards" to the Secretary, who shall approve it if it meets certain criteria set forth in Section 18(c) (emphasis added).

The three subsections of Section 18 read together compel the conclusion that Congress intended (1) that ultimately one level of government, federal or state, would regulate any occupational safety and health issue at any

[6] "Relate to" has been construed broadly by this Court as meaning having "a connection with or reference to." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990); *Shaw*, 463 U.S. at 96-97. In the present case, the "issue" addressed by the Final Rule is at a minimum the protection of worker health and safety in the hazardous waste industry. *See* 29 CFR § 1902.2(c)(1) (1990) ("[a]n issue is considered to be an industrial, occupational or hazard grouping"); *see also* 29 C.F.R. § 1910.120, Subpart H, Hazardous materials. State standards duplicating or supplementing hazardous waste worker training, competency and certification requirements addressed in the Final Rule unquestionably "relate to" the broader issue of protecting the health and safety of hazardous waste workers.

one time, (2) that the approval of a state plan would be the sole mechanism by which states might regulate an issue with respect to which an OSHA standard exists, and (3) that the federal and state governments would coordinate the transfer of responsibility to develop and enforce standards. *Cf. Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (courts should "not be guided by a single sentence or member of a sentence") (citation omitted).

Illinois argues that, under Section 18(b), Congress intended to allow states to legislate piecemeal despite the existence of an OSHA standard, and to require an approved plan only if a state sought wholly to displace federal enforcement authority. (Pet. Br. at 14-15.) If this were correct, the language of Section 18(a) would be superfluous: why would Congress limit a savings clause to areas *not subject* to OSHA standards if it also intended to save state laws in areas *subject* to OSHA standards? A reviewing court would either be required to treat all of Section 18(a) as surplusage or would have to construe Section 18(a) as if the last fifteen words of that section—"with respect to which no standard is in effect under Section 655 of this title"—were not there. Either approach would violate a fundamental tenet of statutory construction that seeks to give effect, if possible, "to every clause and word of a statute."[7] *Moskal v. U.S.*, 111 S. Ct. 461, 466 (1990) (quoting *United States v. Menasche*, 75 S. Ct. 513, 519-520 (1955)); *see Fidelity Federal Savings and Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 163 (1982); *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 513 (1981).

Moreover, the state plan mechanism is an integral part of the OSH Act that encourages states to assume compre-

[7] The only possible interpretation that would not render Section 18(a) superfluous would be that Congress gave OSHA discretion to preempt state laws in areas where it chose to adopt standards, in which case the Illinois Acts would be preempted because of OSHA's intent to preempt as clearly stated in the preamble to the Final Rule.

hensive responsibility for occupational safety and health issues subject to federal supervision. At the present time, 23 states and 2 territories have OSHA-approved state plans in effect. *See* 29 C.F.R. §§ 1952, 1956. Under Illinois' interpretation of Section 18, states would have less incentive to assume jurisdiction pursuant to the mandatory plan approval process set forth in Sections 18(b) and (c) because they would not have to comply with that process in order to supplement federal standards.[8]

The correct interpretation of Section 18 is reinforced by Section 18(c)(2) which requires the Secretary to approve a state plan if, in her judgment, "the state standards are or will be at least as effective" as OSHA's standards. Illinois' piecemeal regulation would subvert the careful process contemplated by Sections 18(b) and (c) to avoid arbitrary exclusions of groups of employers and employees, to ensure full participation in the development of complex technical standards by all interested parties and experts, and to coordinate the transfer of enforcement authority from one level of government to the other efficiently.[9]

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[8] This would be contrary to Congress' express desire to encourage states to develop and submit state plans. Because of initial federal funding of up to ninety percent of the cost of developing state plans, excellent models for state plans now exist and new plans can be developed at comparatively little cost. 29 U.S.C. § 672(a)(2), (f). Grants continue to be available for up to fifty percent of the annual cost of implementing state plans. 29 U.S.C. § 672(g); 29 C.F.R. §§ 1951.10, 1951.22.

[9] A state plan must be "at least as comprehensive" as the OSHA standard unless it "show[s] good cause why any group or groups of employers or employees should be excluded." 29 C.F.R. § 1902.2(c). Furthermore, in demonstrating effectiveness, the state must show, *inter alia*, that it has addressed the same specific issues as effectively, has relied upon the best available research and expert technical knowledge, and has conducted hearings involving employees, employers, and the public. 29 C.F.R. § 1902.4(b)(2). Once the plan is approved, OSHA has established an ongoing procedure for evaluating, monitoring and permitting changes to state plans. 29 C.F.R. §§ 1953, 1954. The Secretary must wait at least three years before relinquishing concurrent federal jurisdiction, and may reinstate such jurisdiction if necessary. 29 U.S.C. § 667(e); 29 C.F.R. §§ 1902.1(c)(1)-(2), 1902.36-1902.53.

Concurrent enforcement of different yet overlapping state and federal requirements may well be less effective than a unitary or coordinated enforcement scheme, particularly where the federal standard is carefully crafted to incorporate needed flexibility to respond to special or emergency circumstances. To accept Illinois' argument is to accept the fallacy that more regulation is always more effective regulation. Moreover, because the overall effectiveness of concurrent regulation would be beyond the Secretary's control, Illinois' interpretation negates her statutory obligation to determine such effectiveness in her sole "judgment." 29 U.S.C. § 667(c).

Even more compelling is the requirement of Section 18(c)(2) that the Secretary determine, prior to approving a state plan, that state standards relating to products in interstate commerce "are required by compelling local conditions and do not unduly burden interstate commerce." 29 U.S.C. § 667(c)(2). If states were privileged under Section 18 to "supplement" federal standards without filing state plans, the Secretary's authority to prevent undue interference with interstate commerce would be easily circumvented.

Illinois relies heavily upon *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991), to suggest that an inference of preemption should never be drawn from statutory language that authorizes state legislation. (Pet. Br. at 16-17.) *Mortier* does not assert so broad a proposition. In that case, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") expressly allowed *states* to regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by the Act, 7 U.S.C. § 136v(a). The question presented was whether the statute's silence with respect to *local* governmental regulation of pesticide use indicated that local governments were excluded, even though local governments are political subdivisions of states. This Court

concluded that "[m]ere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to preempt local authority." *Mortier*, 111 S. Ct. at 2483 (citations omitted).

Here, the facts are very different. Unlike FIFRA, which was completely silent as to regulation by local government, Section 18 of the OSH Act deals expressly and in detail with state regulations, such as the Illinois Acts, which duplicate federal regulations.[10] In concluding that, in FIFRA, the term "state" includes its political subdivisions, this Court adopted both a positive and a negative inference. On the one hand, local governments, like the state of which they are a part, could regulate the sale or use of pesticides. On the other hand, by negative inference, local governments could "not permit any sale or use prohibited" by federal regulation. 7 U.S.C. § 136v(a). Similarly, a proper construction of Section 18 allows both positive and negative inferences. States may duplicate or supplement federal standards if they file a state plan in accordance with the explicit requirements of Section 18(b), but they may not do so if they do not file such a plan.

Illinois also argues that the OSH Act does not contain the breadth of preemptive language found in the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a). (Pet. Br. at 15 n. 3.) Unlike ERISA, however, the OSH Act offers the states an option to exercise their traditional authority even in areas governed by federal law. Congress may express its intent to preempt through a scheme of cooperative federalism just as clearly as it may express its intent to preempt all related state laws absolutely and in all circumstances. To insist on specific prohibitory words would penalize Congress for creating a flexible scheme that encourages and accommodates state participation.

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[10] The validity of *local* regulation of occupational safety and health in the absence of a state plan is not at issue in this case.

Illinois further contends that the Illinois Acts are not "standards." (Pet. Br. at 32-33.) The OSH Act and OSHA regulations define "standard" as "requir[ing] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8); 29 C.F.R. § 1910.1(f). Illinois argues that licensing is a precondition to employment and therefore does not constitute a "condition" of employment. (Pet. Br. at 32-33.) Illinois presumably concedes that the Illinois Acts are "reasonably necessary or appropriate" to achieve their stated goal of worker safety. Moreover, the trial judge entered a finding of fact that "[t]he Illinois Acts regulate the same matter (and therefore the same employees) as Part 1910.120." (Pet. App. at 49). OSHA's only regulatory authority in this area is to issue "standards": if worker certification requirements are standards when promulgated by OSHA, then they must be standards when enacted by Illinois, at least for the purpose of federal preemption analysis.[11]

The AFL-CIO, as *amicus curiae*, suggests that the Illinois Acts are not "standards" because they regulate employees while OSHA regulates employers. (AFL-CIO Brief at 18-19.) Neither characterization is entirely accurate. Both Illinois Acts impose penalties on employers who knowingly utilize unlicensed workers. Ill. Stat. at paras. 7715(b), 7716(b), 7814(b). In addition, Congress empowered OSHA to regulate employee as well as employer behavior. 29 U.S.C. § 651(b)(2) ("by providing that employers *and employees* have separate but dependent responsibilities and rights") (emphasis added); 29 U.S.C. § 654(b) ("Each *employee* shall comply with occupational

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[11] Congress also disagrees with Illinois. Section 126 of SARA directed the Secretary to promulgate "standards" that included training requirements for workers "*before* such workers are permitted to engage in hazardous waste operations" and to provide for "certification" of such workers. 29 U.S.C. § 655 note, at (a), (b)(2) and (c)(3) (emphasis added).

safety and health standards") (emphasis added); *see also* 29 U.S.C. § 651(b)(1).

The AFL-CIO observes that OSHA has interpreted its proposed standard for Occupant Protection in Motor Vehicles as not preempting generally applicable state laws regarding use of safety belts and motorcycle helmets. 55 Fed. Reg. 28,728, 28,739 (1990); (AFL-CIO Brief at 18-19). OSHA has noted that "the proposed standard has been carefully worded to regulate a safety and health issue distinct from the subject matter addressed by these state laws." 55 Fed. Reg. 28,728, 28,739 (1990). If anything, this demonstrates OSHA's consistent desire to limit preemptive effect to state standards that directly relate to the specific issue addressed by the federal standard in accordance with Section 18. *See also, e.g.*, 54 Fed. Reg. 9294, 9315 (1989) ("OSHA has used its regulatory preemption of State law to the minimum level necessary to achieve the objectives of the OSH Act and section 126 of SARA"). Unlike states' general motor safety laws, which govern conduct beyond the workplace, the Illinois Acts regulate the competency and training of only one group—the hazardous waste remediation and disposal industry—which is also the group directly subject to an OSHA standard that addresses the same issue.[12] *Cf. Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 & n.11 (1988).

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[12] The AFL-CIO also refers to a statement that OSHA would not take any formal or legal action to preempt inspections by state and local fire marshals. However, OSHA cautioned that "States which carry out these enforcement activities without an approved 18(b) plan covering the standards would be subject to challenge on appeal by employers." OSH Act Instruction STP 2-1.10A, Mar. 13, 1981, *reprinted in* 1984 CCH Employment Safety & Health Guide ¶ 5008.71; *see also* OSHA Policy Statement, April 1972, *reprinted in* 1984 CCH Employment Safety & Health Guide ¶ 5008.81; (AFL-CIO Brief at 18.) OSHA apparently relied on the longstanding and widespread employment of fire marshals to infer that Congress did not intend to halt their activity. OSHA Policy Statement, April 1972, *reprinted in* 1984 CCH Employment Safety & Health Guide ¶ 5008.81.

B. SARA and the OSH Act Express Congress' Intent to Eliminate Duplicative Regulation of Hazardous Waste Workers.

Statutory language must be interpreted in light of the entire statute. *Philbrook*, 421 U.S. 707, 713 (1975). The OSH Act read as a whole compels the conclusion that Congress intended that regulation of occupational health and safety should not be duplicative and therefore that the states must submit a plan to the federal government in order to regulate in areas in which OSHA has promulgated standards. *Cf. Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 641, *opinion and judgment vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987) ("Section 18(a)'s preemption rule serves the useful function of protecting employers from conflicting standards and a double dose of enforcement agents.").

When Congress intended to reserve specific powers to the states in the OSH Act, it said so explicitly and precisely. As noted above, Section 18(a) expressly allows state regulation in areas not covered by a federal standard.[13] Section 4(b)(4) expressly disclaims preemption of state worker compensation and tort laws. 29 U.S.C. § 653(b)(4). Section 4(b)(1) reserves state powers to regulate, in conjunction with Federal law, the occupational safety and health of nuclear energy employees. 29 U.S.C. § 653(b)(1). The absence of language in the OSH Act reserving to the states the authority to duplicate or supplement federal standards is especially significant in light of the many other federal statutes in which Congress has included analogous language.[14]

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[13] Section 18(h) expressly allowed state regulation in areas covered by an OSHA standard to remain in effect upon agreement with the Secretary, *but only* during an interim period of not more than two years from the enactment of the OSH Act. 29 U.S.C. § 667(h). This provision also undermines Illinois' position since it makes no allowance for "supplementary" standards beyond the two-year period.

[14] *See, e.g.*, 15 U.S.C. § 2075 (states prohibited from having product safety standards that overlap with federal standards unless

Regulatory consistency and coordination was a special concern of Congress in Section 126 of SARA. Since state and local employees are excluded from OSHA jurisdiction, Section 126(f) of SARA requires the EPA to promulgate standards "*identical* to those promulgated by the Secretary of Labor" which "shall apply to employees of State and local governments in each State which does not have in effect an approved State plan." 29 U.S.C. § 655 note at (f) (emphasis added).

Other provisions of the OSH Act demonstrate that Congress sought to avoid overlapping occupational safety and health regulation by more than one federal or state agency. Section 4(b)(1) prohibits the application of OSHA standards to employees of other federal and certain state agencies with authority to regulate occupational safety or health, and Section 4(b)(3) directs the Secretary "to avoid unnecessary duplication and to achieve coordination" between OSHA and other federal laws. 29 U.S.C. § 653(b)(1) & (3); *see also* 29 U.S.C. § 657(d) ("information . . . shall be obtained with a minimum burden upon employers . . . . Unnecessary duplication . . . shall be reduced to the maximum extent feasible.") Coordination with respect to the employees of other federal agencies is achieved through OSHA regulations that are analogous to the procedure for federal-state cooperation

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they provide a "significantly higher degree of protection" from risk of injury, and do not "unduly burden interstate commerce"); 21 U.S.C. § 360k (states may not have standards for "device[s] intended for human use" that differ from federal standards, but exceptions may be granted if state requirements are more stringent than the federal standard, and are required by "compelling local conditions"); 33 U.S.C. § 1370 (states may not adopt water pollution standards that are less stringent than overlapping federal standards); 42 U.S.C. § 7416 (state air pollution standards may not be less stringent than standards established under applicable federal law); 42 U.S.C. § 7543 (states may adopt motor vehicle emission standards prior to a certain date if they are "at least as protective of public health" as the federal standards and are required to "meet compelling and extraordinary conditions").

provided in Section 18 and require similar supervision by OSHA.[15]

C. The Legislative Context of the OSH Act Demonstrates that Congress Deliberately Crafted Section 18 So As to Preclude "Supplemental" State Regulation.

The legislative history of the OSH Act demonstrates that Congress chose not to include language that would have saved more stringent state legislation relating to worker safety and health issues subject to a federal standard. Not only did Congress reject such language in legislation proposed by the Nixon Administration, but it also rejected savings language contained in other occupational safety and health legislation that the same Congress had previously enacted.

The Federal Coal Mine Health and Safety Act of 1969 (the "Mine Safety Act") was enacted by the same Congress and reported by the same committees as the OSH Act.[16] Both laws sought to expand federal efforts to regulate occupational safety and health. The Mine Safety Act followed an earlier Federal Metal and Nonmetallic Mine Safety Act (the "Metal Mine Act"), Act of Sept. 16, 1966, 80 Stat. 772, *repealed by* Act of Nov. 9, 1977, P.L. 95-164, Title III § 306(a), 91 Stat. 1322. These two prior statutes show that the scheme for submitting state plans to federal authorities was not an innovation of the OSH Act, and that when Congress in-

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[15] Agency heads are required by Section 19 to establish and maintain standards identical to OSHA's or obtain OSHA approval. 29 U.S.C. § 668; 29 C.F.R. §§ 1960.1, 1960.17. In areas "*for which there exists no appropriate OSHA standards*," agency heads are required to adopt additional standards "as necessary and appropriate to working conditions of agency employees . . . ," which may be disallowed by OSHA if "inconsistent with OSHA standards." 29 C.F.R. § 1960.18(a)-(b) (emphasis added).

[16] *See, e.g.*, Colloquy among Sen. Dominick, Sen. Saxbe, and Sen. Williams, in Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 340-341 (1970) ("Legislative History").

tended to permit more stringent state regulation in areas covered by a federal standard, it said so explicitly. In the Metal Mine Act, Congress chose to employ state plans but to *allow* more stringent state legislation.[17] H.R. Comm. Rep. No. 1296, 89th Cong., 2d Sess. at 13-15 (1966). Subsequently, in the Mine Safety Act, Congress chose not to employ state plans, but still to *allow* more stringent state legislation. H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. (1969), *reprinted in* Legislative History of the Federal Coal Mine Health and Safety Act of 1969 As Amended Through 1974, at 1537, 1627 (1975).[18] In the OSH Act, Congress again utilized the state plan mechanism but *did not allow* more stringent "supplemental"

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[17] The Metal Mine Act provided in pertinent part:

§ 16(a) Any State which . . . desires to develop and enforce health and safety standards in mines . . . shall submit . . . a State plan for the development of such standards and their enforcement.

§ 19(a) No state . . . law . . . shall be superseded by any provision of this Act, except insofar as such State or territorial law is in conflict with this Act, or with orders issued pursuant to this Act.

(b) Provisions in any State . . . law . . . which provide for greater safety of persons in a mine as defined in this Act, than do provisions of this Act, which relate to the same phase of such operations, shall not be construed or held to be in conflict with this Act.

Act of Sept. 16, 1966, ch. 21, 80 Stat. 772, 782-784, *repealed by* Act of Nov. 9, 1977, 91 Stat. 1322; *see* Senate Comm. on Labor and Public Welfare, Federal Metal and Nonmetallic Mine Safety Act, S. Rep. No. 1296, 89th Cong., 2d Sess. at 14 (1966).

[18] (a) No State law . . . shall be superseded by any . . . order issued or any mandatory health or safety standard, except insofar as such State law is in conflict . . . with any order issued or any mandatory health or safety standard.

(b) The provisions of any State law or regulation . . . which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this chapter or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this chapter.

30 U.S.C. § 955(a) and (b).

state regulation except as part of an approved state plan.[19] 29 U.S.C. § 667(a)-(b).

Congress easily could have incorporated the language contained in the Nixon Administration's version of the OSH Act, which explicitly saved more stringent "supplemental" state regulation from preemption.[20] But Congress rejected such language, and OSHA itself has cited Congress' rejection of this language to confirm that the OSH Act preempts legislation by states without approved plans that relates to issues subject to a federal standard, "without regard to whether the state law would conflict with, complement, or supplement the Federal standard . . . ." Hazard Communication, 52 Fed. Reg. 31,852, 31,860 (1987).

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[19] Illinois' selective quotation of members of Congress actually supports the conclusion that Congress by enacting the OSH Act departed from previous laws which allowed for more stringent state regulation. Illinois quotes Rep. Dent as saying, "Federal legislation has never yet superseded State legislation when the state law is superior to the provisions of the Federal law." 116 Cong. Rec. H1460, *reprinted in* Legislative History at 1029. Rep. Dent, however, then goes on to say, "We took care of that in the Mine Safety Law. For instance, two areas where we have Federal legislation . . . are the Mine Safety Act and the Longshoremen's Safety Act." *Id.* at 1029-30. Examination of these two statutes reveals regulatory schemes that, unlike the OSH Act, expressly provide for concurrent federal-state regulation. *See*, Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173 (codified as amended at 30 U.S.C. §§ 953, 955 (1988)), and Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 941 (1988).

[20] Section 14(b)(1) of the Administration's bill, S. 2788 and H.R. 13373, 91st Cong., 1st Sess., provided that, "No state agency or health standard in effect upon the effective date of this Act or which may become effective thereafter, shall be superseded by any standard promulgated under this Act except insofar as such State safety or health standard is in conflict with this Act." Sec. 14(b)(2) provided that, "Any State safety or health standard in effect upon the effective date of this Act, or which may become effective thereafter, which affords employees significantly greater protection than a safety or health standard promulgated under this Act shall not thereby be construed or held to be in conflict."

D. The Occupational Safety and Health Administration Interprets Section 18 as Preempting Duplicative or Supplemental State Regulation.

OSHA has consistently interpreted Section 18 as preempting supplemental state laws unless OSHA has approved a state plan.[21] An administrative agency's interpretation of its enabling legislation has been accorded great weight by this Court. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Construction Trades Council*, 485 U.S. 568, 574 (1988); *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 714-715 (1985); *Chevron USA Inc. v. National Resources Defense Council*, 467 U.S. 837, 843 (1984); *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979); *see also Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (Scalia, J., concurring). While the preemptive effect of Section 18 is quite explicit, to the extent that there is any ambiguity in the statutory language, it should be resolved by deference to the agency interpretation. *See Presley v. Etowah County Comm'n*, Nos. 90-711, 90-712, 1992 U.S. LEXIS 554 (Jan. 27, 1992); *Lechmere, Inc. v. NLRB*, No. 90-970, 1992 U.S. LEXIS 555 (Jan. 27, 1992).

[21] An OSHA Instruction confirms OSHA's "view . . . that the intention of Congress under Section 18(a) of the Act was to preempt States without an approved 18(b) State plan from enforcing standards covering occupational safety and health hazards for which Federal standards are in effect." OSH Act Instruction STP 2-1.10A, Mar. 13, 1981, *reprinted in* 1984 CCH Employment Safety & Health Guide ¶ 5008.71. Since 1987, OSHA and other federal agencies have been required by executive order to consider the effect on federalism of their proposed rules. Section 4(a) of Executive Order 12612 instructs executive departments to "construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute." Executive Order 12612 of October 26, 1987, 52 Fed. Reg. 41,685, 41,686 (1987). *See, e.g.*, Hazard Communication Standard, 52 Fed. Reg. 31,852, 31,860 (1987).

In the preamble to the Final Rule, OSHA confirmed "Congress' clear intent to preempt state laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards." 54 Fed. Reg. 9294, 9315 (1989). The preamble further provides that "[t]o the extent that there are state or regional peculiarities caused by the types of hazardous waste operations . . . *states with occupational safety and health plans approved by OSHA* under section 18 of the OSH Act would be able to develop their own state standards to address any special problems." *Id.* (emphasis added). The preamble advises that "if a state develops its own OSHA approved state program, it could make additional requirements in its standards." *Id.* at 9316. These statements show unequivocally that OSHA interprets the OSH Act as precluding states without state plans from enacting legislation directly relating to issues addressed by federal standards.[22]

[22] By contrast, Illinois points only to a non-mandatory note in the Final Rule, stating that safety and health programs developed to meet other federal, state or local regulations may be retained if properly supplemented to conform to OSHA's requirements, as evidence that OSHA permits supplemental state regulation. (Pet. Br. at 29), 29 C.F.R. § 1910.120(b) note. Illinois misinterprets OSHA's intent. In the preamble to the Final Rule, OSHA notes that several commentors had suggested that OSHA's requirements "were somewhat duplicative of the contingency plans and emergency response plans required by the E.P.A. for its permit requirements. . . . OSHA does not intend to require the duplication of efforts made to meet other governmental regulations. 54 Fed. Reg. 9294, 9302 (1989). This allowance was made by OSHA to *avoid* duplicative regulation, largely required by federal entities, and to reduce the burden on employers, in the narrow setting of *pre-existing* written safety programs, not to permit states subsequently to enact duplicative and burdensome piecemeal legislation affecting the regulated area.

Illinois also questions OSHA's intent to preempt,[23] arguing that, because a statement regarding preemption was included only in the preamble to the Final Rule and not in the text of the Final Rule itself, OSHA did not intend the Final Rule to have preemptive effect.[24] (Pet. Br. at 26.) As this Court has recognized, however, preambles are one of the "variety of means [through which] . . . we can expect that [agencies] will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough*, 471 U.S. at 718; *cf. Fidelity Federal Savings and Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 147, 158 (1982).[25]

[23] If the OSH Act were silent as to preemption, OSHA itself would have the authority to preempt related state laws. Express preemption by an administrative agency has been accorded effect equal to express preemption by Congress itself. *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Therefore, if this Court concludes, despite the explicit preemptive language of Section 18, that Congress intended to delegate preemptive discretion to OSHA, the Court should defer to OSHA's clear expression of the preemptive reach of the Final Rule.

[24] Illinois argues that the inclusion of express preemptive language in the text of OSHA's Hazard Communication Standard, 29 C.F.R. § 1910.1200(a)(2) (1991), and the omission of such language from the text of other final standards, including the Final Rule, demonstrates lack of preemptive intent. (Pet. Br. at 27). Illinois apparently rejects the maxim *expressio unius est exclusio alterius* in parsing the express language of Section 18, but adopts it wholehcartedly in analyzing the long history of OSHA rulemaking. Moreover, Illinois' arguments are contradictory. Illinois has argued that Section 18 reflects Congress' express intent not to delegate preemptive discretion to OSHA but to allow states to enact supplemental legislation in all cases. How could the Hazard Communication Standard demonstrate OSHA's decision to preempt in just that one instance if OSHA had no delegated authority to preempt at all?

[25] In addition, where OSHA has intended that a standard not interfere with particular state laws not substantially affecting occupational health and safety or with the application of state laws to certain groups of employees not subject to federal regulation, OSHA has followed Section 18 by framing the issue addressed by its standard narrowly and stating so plainly in its regulations. *See, e.g.*, 29 C.F.R. § 128.110(a) (Field Sanitation Standard limited to agricultural establishments with more than ten employees); 55 Fed. Reg. 28,728, 28,739 (1990) (issue of Occupant Protection in Motor Vehicles framed so as not broadly to preempt general state motor vehicle laws). *See also Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171, 1175-1176 (1991) ("an agency's construction of its own regulations is entitled to substantial deference.") (citation omitted).

E. The Contested Provisions of the Illinois Acts Duplicate, Supplement and Conflict With OSHA's Final Rule and Frustrate the Purposes of the Federal Legislative Scheme.

Illinois has chosen not to submit the state plan called for by Section 18(b), but has nevertheless enacted licensing requirements which include competency standards that duplicate, supplement and conflict with the Final Rule. Illinois' rejection of the explicit process for federal-state cooperation created by Congress overcomes any "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause," *Hillsborough*, 471 U.S. at 715.

The cases cited by Illinois do not support its claim that states may enact "supplemental" regulations for occupational safety and health without regard to Section 18.[26] In *Hillsborough*, 471 U.S. 707 (1985) (Pet. Br.

[26] Illinois makes much of the fact that the OSH Act is described as establishing "minimum requirements." (Pet. Br. at 18-19.) To the extent Illinois' criticism of "minimum requirements" suggests that OSHA should frame, for example, a training requirement as an absolute or maximum number, the argument is frivolous. (*See* Pet. Br. at 29.) To the extent Illinois suggests merely that states are allowed to do more, the sensible interpretation is again evident from Section 18. States are invited to enact standards "at least as effective" as OSHA standards and thereby to build upon the "federal floor" by assuming responsibility for developing and enforcing occupational safety and health standards in federally regulated areas, *but only upon approval of a state plan filed pursuant to Section 18(b). See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n. 19 (1978) ("[a] statutory reference to 'minimum standards' . . . [does not furnish] a litmus paper test for resolving issues of preemption"); *Florida Lime*, 373 U.S. at 171 (White, J., dissenting); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

at 28), this Court held that local ordinances and regulations governing blood plasma centers were not impliedly preempted by § 351 of the Public Health Service Act and Food and Drug Administration ("FDA") regulations. Congress had not expressed an intent to preempt such local regulations and the FDA had expressly disavowed preemptive intent, a factor given substantial deference by the Court. *Hillsborough*, 471 U.S. at 714-715. By contrast, Section 18 sets forth explicitly those areas in which a state may not regulate without an approved plan, which OSHA has repeatedly invoked in its rulemaking.

New York Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) (Pet. Br. at 21), addressed whether eligibility criteria enacted by New York in furtherance of the federal government's Aid to Families With Dependent Children ("AFDC") program were consistent with the provisions of the Work Incentive Program ("WIN"), a federal program also within AFDC. *Dublino*, however, "[did] not involve arguable federal pre-emption of a wholly independent state program dealing with the same or a similar problem." *Dublino*, 413 U.S. at 411 n.9. The Court noted that Congress had not expressed any intention that WIN should supersede state AFDC implementation, that the responsible federal agency never considered the WIN legislation preemptive and that "WIN is a partial program which stops short of providing adequate job and training opportunities." *Id.* at 416, 419-20. By contrast, OSHA's Final Rule is comprehensive and has been interpreted by OSHA as preempting state enactments on the same issue.

In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987) (Pet. Br. at 21), this Court held that an Indiana Act regulating the acquisition of voting control following a tender offer was not impliedly preempted by the federal Williams Act. Relying on the absence of express preemptive language in the Williams Act, the Court concluded that "if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly."

481 U.S. at 85-86. Unlike the OSH Act, the Williams Act had not expressly delineated areas in which the states might regulate or provided a specific mechanism for state regulation in other areas.

Illinois' reliance on these implied preemption decisions disregards the expressed intent of Congress to prohibit redundant or supplemental state legislation except in conjunction with an approved state plan. Moreover, the implied preemption jurisprudence developed by this Court would not save the Illinois Acts even if Congress had been completely silent with respect to state regulation of occupational safety and health. The Illinois legislation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In SARA, Congress mandated a comprehensive OSHA program for the protection of hazardous waste workers. The Illinois Acts require that these workers undergo an IEPA or EPA approved training course for 40 hours, pass an IEPA prescribed written test and, in the case of crane and hoist operators, show that they have worked with such equipment for at least 4,000 hours. The court below concluded that some of these provisions "might well duplicate (or even conflict with) OSHA's training requirements." *Killian*, 918 F.2d at 678. In fact, the Illinois Acts *do* create duplication and conflict that frustrates the purpose of Congress; therefore, the Illinois Acts may not stand. *Cf. Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190, 220-221 (1983).

For example, the Illinois Acts do not permit workers with training or experience equivalent to the 40-hour requirement to obtain licenses. In contrast, Section 126(d)(1) of SARA specifically directs that the hour-based training requirements for non-emergency workers "*shall not apply* to any general site worker who has received the equivalent of such training."[27] 29 U.S.C.

[27] SARA's provision for equivalent training affirms a basic tenet of OSHA regulation: the need for flexibility in designing and en-

§ 655 note at (d)(1) (emphasis added). Furthermore, by requiring training in an EPA or IEPA approved program, the Illinois Acts would conflict with SARA's direction that OSHA regulate accreditation of training programs for hazardous waste operations and with OSHA's proposed rules on that subject. Ill. Stat. at paras. 7705 (c), 7805; 101 Stat. at 1329-198 (1987); 55 Fed. Reg. 2776, 2778-2779 (1990). In addition, the Illinois Acts do not permit any flexibility in emergency operations at covered facilities, which conflicts with OSHA's recognition that "emergency actions necessary to protect the public safety and health [should not] be prevented because in a particular circumstance it is not feasible to carry out particular requirements of this standard in the time needed to respond to the emergency." 51 Fed. Reg. 45,654, 45,662 (1986); *see also* 29 C.F.R. § 1910.120(e), (p)(7), (8)(iii), (q)(4)-(8); 54 Fed. Reg. 9294, 9328-29 (1989).

The 4,000-hour requirement of the Operators Act has no parallel in the Final Rule. Any employer wishing to employ hazardous waste crane operators in Illinois would be forced to hire persons possessing Illinois credentials. The trial judge found that the Illinois Acts would diminish the pool of workers available to clean up hazardous waste sites, which could be critical in an emergency response situation[28] (Pet. App. at 50). *See also, e.g.*, (Tr. at 35).

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forcing standards. *See* 29 U.S.C. § 655(d) (variances); 29 U.S.C. § 655(b)(6)(A) (temporary variances); 29 C.F.R. § 1905. This Court has held that a lack of provision for variation in a state standard where such variation was essential to the federal scheme was sufficient to imply preemption even without express statutory language such as exists in Section 18. *Jones v. Rath Packing Co.*, 430 U.S. 519, 542-543 (1977).

[28] Efficient emergency operations by national enterprises would be frustrated if other states followed suit by enacting redundant, inconsistent and state-specific requirements for hazardous waste workers. The filing of a brief *amicus curiae* in support of Illinois by nine other states suggests the possibility of such state legislation. Because specialized hazardous waste operations in southern Illinois are covered by teams from Missouri and central Illinois from Indiana, the Illinois Acts potentially would delay cleanup in parts of Illinois for up to six hours until less specialized workers arrived from Chicago. (Tr. at 31-32.)

The Illinois Acts also would interfere with the operation of the "buddy system" by forcing interstate waste management companies to select workers meeting specific state requirements rather than being able to transport, immediately and to any place in the country, an expert team accustomed to handling a particular type of hazardous material. (Tr. at 73.) The buddy system works effectively only when workers have developed familiarity with each other's skills and practices. *See, e.g.*, 29 C.F.R. § 1910.120(a)(3) ("The purpose of the buddy system is to provide rapid assistance to employees in the event of an emergency."); 29 C.F.R. § 1910.120(q)(3)(v) (in an emergency response to a hazardous substance release, "operations in hazardous areas shall be performed using the buddy system in groups of two or more").

II. THE TEST APPLIED BY THE SEVENTH CIRCUIT PROVIDES AN OBJECTIVE AND WORKABLE STANDARD FOR APPLYING SECTION 18 OF THE OSH ACT.

A. Congress May Expressly Preempt State Laws That Interfere With the Valid Exercise of Federal Legislative Power Regardless of the Purpose of the State Enactment.

This case presents an opportunity for this Court to resolve a difference of opinion among the circuit courts with respect to the preemption of what has been called "dual purpose" state legislation. "Dual purpose" describes a state enactment which furthers two state interests, only one of which is identical to the purpose of the overlapping federal legislative scheme. The Final Rule is unchallenged as a valid exercise of OSHA's authority to regulate occupational safety and health.[29] Despite the existence of the

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[29] OSHA itself noted the dual impact of its requirements on safety and the environment: "The training requirement will assure

federal standard, Illinois enacted overlapping legislation ostensibly for *both* worker health and safety and public health and safety. The court below recognized that it would "defeat the purpose of Section 18" if a state could enact worker safety standards "simply by asserting a non-occupational purpose for the legislation." *Killian*, 918 F.2d at 679. Such "unauthorized state regulation" could result "in duplication and unwarranted additional costs to workers and employers" as well as interfere with the operation of federal law. *Id.* at 676, 679.

To address preemption in this context, the court below formulated a two-step test that focuses precisely on the effects of the state law on the federal regulation by identifying and invalidating only those provisions that "relate to worker health and safety in a direct, clear and substantial way," subject to severability analysis under state law.[30] *Id.* at 679. The court concluded that "Illinois' 4000-hour rule directly, clearly and substantially implicates worker health and safety as well as public health and safety, and it is impossible to modify the provision so as to delete matter serving the impermissible worker health and safety goal without also eliminating the permissible public health and safety goal." *Id.* at 683. The court therefore held that Section 18 of the OSH Act preempted the challenged provision regardless of its additional asserted purpose.

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that site activities will be carried out by qualified personnel, with the knowledge and ability to fulfill their job functions in a safe and responsible manner. To the extent that this occurs, there will be a potential benefit to the environment." 54 Fed. Reg. 9294, 9313-9314 (1989).

[30] The severability analysis applied by the Seventh Circuit comports with the decisions of this Court, which have held that severability of a state statute is a question of state law. *Exxon Corp. v. Hunt*, 475 U.S. 355, 376 (1986); *Watson v. Buck*, 313 U.S. 387, 395-396 (1941). By preserving a challenged state enactment to the extent compatible with state severability law, the court below intrudes minimally on the legitimate exercise of state power.

The test applied below is directly derived from the holding of this Court in *English v. General Electric Co.*, 110 S. Ct. 2270 (1990). In *English*, the Court preserved a claim under state tort law for intentional infliction of emotional distress, observing that "for a state law to fall within the preempted zone, it must have some *direct and substantial effect* on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." 110 S. Ct. at 2278 n. 7 (emphasis added); *cf. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21 (1983) ("Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."); *Fidelity Federal Savings and Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 171-172 (1982) (O'Connor, J., concurring).

The decisions of this Court do not support states' unlimited authority to interfere with federal law by asserting an additional purpose for their actions. Despite the deference accorded traditional state powers, *see California v. ARC America Corp.*, 490 U.S. 93, 101 (1989), this Court has held since the early days of the republic that Congress may expressly preempt a state law enacted pursuant to its police power that has a direct and substantial effect on the valid exercise of federal authority. *Gibbons v. Ogden*, 9 U.S. (1 Wheat.) 1, 211 (1824) ("the act of Congress, or the treaty, is supreme; and the law of the state, *though enacted in the exercise of powers not controverted*, must yield to it.") (emphasis added).[31]

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[31] Evaluation of the validity of state laws in federally regulated areas must be an effects-oriented rather than a purpose-oriented inquiry. If it were otherwise, the goal of the Supremacy Clause, to protect federal legislation from frustration, would itself be frustrated whenever a state or local government asserted a purpose derived from its broad residual powers rather than the federal government's narrow enumerated powers. *Cf. Jones v. Rath Packing Co.*, 430 U.S. 519, 545 (1977) (Rehnquist, J., concurring in part and dissenting in part) ("Preemption, then, if it is to exist at all in this case, must exist because the *operation* of the state Act inexorably conflicts with the *purposes* underlying the Federal Act") (initial emphasis added).

The standard applied by this Court to cases in which neither Congress nor an administrative agency has expressed preemptive intent demonstrates most clearly the effects-oriented nature of the Supremacy Clause. Implied preemption has been found where Congress intended to "occupy the field" or where there exists an actual conflict between the state and federal laws, either in the sense that it would be impossible to comply with both laws simultaneously or in the sense that the existence of the state law would frustrate the purpose of the federal legislative scheme. *Florida Lime*, 373 U.S. at 142-143; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). These tests look to the effect of the state law on the federal enactment, not to the purpose of the state law.

In *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971), this Court concluded:

> We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.

See also Int'l Paper Co. v. Ouellette, 479 U.S. 481, 498-499 n.19 (1987) (citing *Perez* for the proposition that "effect rather than purpose of a state statute governs pre-emption analysis"); *Pacific Gas*, 461 U.S. at 216-217 n.28; *Alessi et al. v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Florida Lime*, 373 U.S. at 142 (1963); *Napier v. Atlantic Coast Line*, 272 U.S. 605, 612 (1926).

Illinois' reliance on *Pacific Gas*, 461 U.S. at 213, is misplaced. In that case, the Court affirmed the decision of the Ninth Circuit that a state moratorium on the certification of new nuclear power plants was not impliedly preempted by the Atomic Energy Act of 1954. There was no express preemptive language in that statute. To the contrary, Congress expressly made the state's purpose the issue by providing that nothing "shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards," 42 U.S.C. § 2021(k). Not surprisingly, the Court accepted the evidence offered by California that there was a non-safety-related, economic rationale for the challenged moratorium. *Pacific Gas*, 461 U.S. at 213. More significantly, however, the *effect* of the state moratorium on the federal statute was indirect. The Court observed that "the statute does not seek to regulate the construction or operation of a nuclear powerplant." Id. at 212 Furthermore, the Court continued, "[i]t would clearly be impermissible for California to attempt to do so, for such regulation, *even if enacted out of nonsafety concerns*, would nevertheless directly conflict with the NRC's exclusive authority over plan construction and operation." *Id.* (emphasis added). This reasoning plainly demonstrates that, even where Congress expressly raises the issue of state purpose, a permissible purpose will not save a state law with an impermissible effect.[32]

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[32] Subsequent decisions of this Court confirm that *Pacific Gas* does not exempt state laws from preemption based on their asserted purposes. In *English v. General Electric Co.*, 110 S.Ct. 2270 (1990), the Court observed:

> [T]he Court [in *Pacific Gas*] did not suggest that a finding of safety motivation was *necessary* to place a state law within the preempted field. On the contrary, it took great pains to make clear that state regulation of matters directly affecting the radiological safety of nuclear-plant construction and operation, 'even if enacted out of nonsafety concerns, would nevertheless [infringe upon] the NRC's exclusive authority.' 461 U.S., at 212, 103 S.Ct., at 1726. Thus, even as the Court [in *Pacific Gas*] suggested that part of the pre-empted field is defined by reference to the purpose of the state law in question, it made

The preemption analysis of a "dual purpose" state law should therefore be no different from that applied to other state enactments. The suggestion "that the coexistence of federal and state regulatory legislation should depend upon whether the *purposes* of the two laws are parallel or divergent" tends to "obscure more than aid in the solution of the [preemption] problem." *Florida Lime*, 373 U.S. at 141-142. The deference due states' exercise of their police power applies whenever Congress enters a field traditionally occupied by the states, including regulation of occupational safety and health, and does not gather importance because the state asserts additional powers in areas not entered by the federal government. The standard applied by the court below correctly recognizes traditional state authority to enact worker safety and public safety legislation, but correctly disregards Illinois' suggestion that the existence of such residual state authority automatically overrides clear congressional intent to preempt overlapping state laws.

B. The First, Second and Third Circuits Incorrectly Concluded That Preemption Should Depend on the Additional Purposes or Effects of the State Enactment Rather Than on the Direct Effect of the State Enactment on the Federal Legislative Scheme.

In *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989), the Third Circuit invoked the traditional framework for analyzing the preemptive reach of the OSH Act and the Hazard Communication Standard, but based its conclusions as to the viability of certain provisions of the New Jersey Worker and Community Right to Know Act on the "primary purpose" of those provisions. *Id.* at 595. On appeal after remand, *New Jersey State Chamber of Commerce v. Hughey*, 868 F.2d 621 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989) ("*Hughey II*"), the court

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clear that another part of the field is defined by the state law's actual effect on nuclear safety.

110 S.Ct. at 2278 (emphasis in original).

reaffirmed its "primary purpose" test and held that a labeling requirement was "addressed to a concern other than occupational health and safety and [wa]s therefore not expressly preempted by Section 18(a) of the OSH Act." *Id.* at 627. Despite the fact that New Jersey conceded certain "obvious areas of overlap between the state and federal requirement," *id.* at 626, the court then upheld the decision of the lower court on remand "that the New Jersey Act was not an obstacle to the accomplishment of the purposes of the federal standard and consequently . . . that the Act was not impliedly preempted." *Id.* at 622.

This analysis does not comport with the established precedents of this Court. Preemption is a question of congressional intent; "express" and "implied" are merely indicators of the manner in which congressional intent has been elucidated. *Cf. English v. General Electric Co.*, 110 S. Ct. 2270, 2275 n.5 (1990). The Third Circuit saved the state legislation in question from express preemption not because Section 18 is ambiguous, but because the state had asserted a primary purpose different from that of the federal law. The Third Circuit then invoked the traditional test for implied preemption as if Congress had been entirely silent as to the preemptive reach of the OSH Act. But Congress was not silent. In effect, the Third Circuit standard allows a state to defeat the expressed intent of Congress.

In *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48 (2d Cir. 1988), the Second Circuit evaluated a preemption challenge to New York City's asbestos abatement program. The Second Circuit rejected the Third Circuit's test, observing that "'primary' is an ambiguous word, and to adopt its use leads down an unmarked avenue of inquiry into legislative motive, which is 'often an unsatisfactory venture.'" 855 F.2d at 57 (quoting *Pacific Gas*, 461 U.S. at 216). Instead, the court held that "in order to avoid preemption the City must demonstrate only that . . . there is a legitimate and substantial purpose apart from protecting asbestos work-

ers." *Id.* at 57. Applying this extremely permissive standard to the challenged legislation, the Second Circuit upheld a variety of provisions relating to *worker* education based on the city's asserted "legitimate and substantial purpose to promote public safety and health," even if the only arguable effect on safety and health other than that of workers was on workers' immediate families.[33] *Id.* at 57.

The Second Circuit reached this conclusion by removing these provisions from the express preemptive reach of Section 18 based on an additional state purpose while nonetheless admitting that if the city law were *impliedly* preempted as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," preemption would be justified "regardless of the state's legitimate purpose." 855 F.2d at 59 (citing *Pacific Gas*, 461 U.S. at 216 n.28). As is the case with the Third Circuit's decision in *Hughey II*, such reasoning adheres to the form but misinterprets the substance of this Court's preemption jurisprudence by considering "express" and "implied" preemption as unrelated categories rather than as alternative methods of determining congressional intent.

In *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990), the First Circuit held that most of Massachusetts' asbestos abatement scheme was not preempted by OSHA's Hazard Communication Standard. The First Circuit test "look[s] . . . to the effect of the regulatory scheme" *in addition to* worker health and safety. *Id.* at 279. The court concluded that "[if] the effect [of] . . . the Massachusetts standards . . . is to protect the public, the state regulation is not preempted. If the effect is solely to protect workers, the OSHA Standard

[33] The court upheld educational requirements relating to the following: the physical characteristics and aerodynamic qualities of asbestos, the health hazards and effects of asbestos and routes of exposure, worker's personal hygiene, personal protective equipment, on-the-job work practices, air monitoring, remediation methods, decontamination and airflow direction, and safety hazards.

prevails and the state regulation falls. If the effect is to protect the public by regulating workers and work places, the regulation stands because its ultimate effect is protection of the public." *Id.* at 279-280.

The First Circuit test avoids divining state legislative purpose, but indiscriminately protects *all* legislation that furthers *any* exercise of state residual powers regardless of congressional intent. This stands the Supremacy Clause on its head. Where a federal and a state law regulate exactly the same matter, such as training requirements for hazardous waste workers, and the effects of such regulation further the exercise of both a federal and a state power, the First Circuit standard would deny Congress its constitutional ability to preempt the state enactment.

The decisions of the circuit courts relied upon by Illinois render express preemption analysis and therefore the expressed intent of Congress irrelevant so long as a legitimate additional state purpose or effect exists. As convenient as these "bright-line" rules appear at first glance, they incorrectly interpret the Supremacy Clause, deny Congress its preemptive power, and disregard the decisions of this Court. By contrast, the Seventh Circuit's test recognizes that there is no easy substitute for a case-by-case inquiry as to the expressed scope of congressional preemptive intent. *Cf. Florida Lime*, 373 U.S. 132, 142 (1963) ("There is not—and from the very nature of the problem there cannot be—any rigid formula or rule . . .").

Only the effects-oriented test of the Seventh Circuit focuses on the impairment of the federal enactment rather than on the characteristics of the state enactment, whether "purpose" or "effect." What creates an obstacle to a federal legislative scheme is not a state law with a "dual purpose" but one with a direct and substantial effect on federal law. Whatever the articulated goals of a state law and whatever its effects in other regulatory spheres, the overriding concern to a federal court hearing an express preemption challenge is whether the state

law has a "direct and substantial effect" on the operation of federal law. *Cf. English*, 110 S. Ct. at 2278 n.7.

C. The Seventh Circuit Test Avoids Requiring Federal Judges to Probe the Minds of State Legislatures.

Unlike the purpose-oriented tests of the Second and Third Circuits, the Seventh Circuit standard avoids inquiring into the intent of state legislatures. If the validity of state legislation were to depend on its purposes, federal judges would become the inquisitors of state legislatures, divining correctly or incorrectly the "true" motives behind state legislative action. Although this may be a necessary task in other constitutional arenas, it is of little value in the evaluation of a claim of express preemption. Congressional intent to preempt state law is essential to the analysis of a preemption claim; state legislative intent should be irrelevant.

The assessment of state legislative intent by a federal court is unpredictable. *Cf. Pacific Gas*, 461 U.S. 190, 216 (1983). Because asserted purposes may be unreliable, "this Court is not bound by '[t]he name, description or characterization given [a challenged statute] by the legislature or the courts of the State,' but will determine for itself the practical impact of the law." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (quoting *Lacoste v. Louisiana Dept. of Conservation*, 263 U.S. 545, 550 (1924)); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 607 (1987) (Scalia, J., dissenting). In addition, individual legislators may vote in favor of the same bill for different reasons. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 703 (1981) (Rehnquist, J., dissenting). State legislators could exercise their historic powers with greater confidence knowing that only legislation with a direct, clear and substantial effect on an expressly preempted federal legislative area is forbidden. To provide such guidance should be a goal of the courts. *Id.* at 706 (Rehnquist, J., dissenting).

The difficulty of evaluating the nature and legitimacy of state legislative intent is aptly demonstrated in this

case.[34] Moreover, apart from their clear interference with OSHA's regulatory scheme, the effects of the Illinois Acts are speculative.[35] The title of the Illinois Acts character-

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[34] The legislative history of the Illinois Acts creates serious doubts as to the legitimacy of the state purposes asserted by Illinois. Because the Illinois Acts were not added to HB-3100 until a few days before the bill was passed, official transcripts reveal only brief debate in both houses regarding worker licensing. State of Illinois, 85th General Assembly, Senate Transcription Debate, July 1, 1988 (App. at 27a); State of Illinois, 85th General Assembly, House of Representatives Transcription Debate, July 1, 1988 (App. at 18a). Comments by the bill's proponents suggest that the Illinois Acts were reintroduced at the eleventh hour at labor union behest because hazardous waste disposal companies were bringing in skilled workers from out-of-state. State Senator Rock, arguing in support of the Illinois Acts, observed that "we have been discussing for a number of years the licensure of those members of the laborers union and the crane operators who dealt in hazardous waste sites. *It is extremely important if we are to retain jobs in Illinois* that this provision, in fact, be included." (emphasis added). Remarks of Sen. Rock, State of Illinois, 85th General Assembly, Senate Transcription Debate, July 1, 1988 at 18 (App. at 38a). Representative Wennlund, speaking in support of passage of the entire package bill, remarked that "I realize that some of the provisions with respect to the crane operators licensing may be somewhat offensive," but nevertheless concluded that "I strongly urge a 'yes' vote even if you have to hold your nose with respect to the crane operators." Remarks of Rep. Wennlund, State of Illinois, 85th General Assembly, House of Representatives Transcription Debate, July 1, 1988 at 58 (App. at 22a).

[35] The 4,000-hour requirement, for example, relates only to experience with the *types of equipment* that may be used for waste handling, not to experience actually handling hazardous waste, and benefits most directly union members who have kept records of such operations. Incredibly, both the Operators Act and the Laborers Act exempt hazardous waste workers using small-capacity lifters such as forklifts and bobcats. This leads to the irrational result that the laborer who shovels hazardous waste into barrels, the operator who picks up a large but empty tank with a crane, and the worker who sweeps up afterwards all must have valid licenses under the Illinois Acts, but the operator who moves rusting barrels with a forklift or removes hazardous waste from a trench with a bobcat (and who does not belong to the union involved in drafting the Illinois Acts) may remain unlicensed. In addition, the Illinois Acts exempt workers in various industries and

izes them as "in relation to environmental protection," Public Act 85-1195, codified at Ill. Stat. at para. 7701-7717, while the text describes them as necessary "to promote job safety and . . . protect life, limb and property." Ill. Stat. at paras. 7702, 7802. However, the trial judge found (1) that the IEPA did not even participate in the drafting of the Illinois Acts, while Local 150 of the Operating Engineers' union did (Pet. App. at 49), and (2) that Illinois introduced no evidence at trial that would arguably show that the 4,000-hour requirement would reduce the risk of danger to the public or employees or the environment. (Pet. App. at 19, 58-59.) Given these circumstances, the purpose tests of the Second and Third Circuits and the additional effect test of the First Circuit would require judicial telepathy and would arguably produce random results.

D. The Seventh Circuit Test Would Not Threaten States' Licensing and Police Powers.

Illinois claims that application of the Seventh Circuit standard would broadly preempt a variety of important state laws, ranging from licensing of healthcare workers to local building codes. (Pet. Br. at 35-36.) NSWMA must regrettably rain on Illinois' parade of horribles. The point of the Seventh Circuit's test is that the detrimental effect of the state enactment on the federal scheme must be direct, clear and substantial.[36] This conclusion

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workers who are employed by manufacturers rather than hazardous waste contractors. This sieve of coverage hardly supports a rationale of public safety or environmental benefit.

[36] The test employed by the court below would recognize, for example, that most tort and criminal laws of general applicability do not affect in a direct, clear and substantial manner employer-employee obligations with respect to health and safety matters in the workplace. *Cf. People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962, 967 (1989); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). These laws apply with hindsight to those who have caused worker injury, illness or death, and therefore differ conceptually from the OSHA Final Rule and the Illinois Acts, which prospectively prescribe conduct necessary or appropriate to avoid such unfortunate outcomes. *See* Note, *Getting Away with*

may only be reached with reference to the scope of Congress' expressed intent to preempt. Section 18 of the OSH Act does not reflect a broad intent to supersede state law comparable to ERISA. *Cf. Franchise Tax Bd. of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). On the contrary, Congress' intent to preempt under the OSH Act is limited. Certain powers are expressly reserved to the states in Sections 4(b)(1), 4(b)(4) and 18(a), and states may assume exclusive responsibility for developing and enforcing standards under an approved state plan. All that is preempted is state regulation of worker health and safety relating to an issue covered by a federal standard in the absence of a state plan. Moreover, the court below requires a showing that the state regulation directly, clearly and substantially affects employer-employee obligations in the workplace. Thus, the interaction between the intent of Congress and the effect of the state law must be evaluated on a case-by-case basis. Finally, by severing and preserving the portions of the state law that do not interfere with federal legislation, the test applied below respects states' enforcement responsibilities. The practical application of this test will not lead to wholesale abrogation of states' general police powers. Rather, it will remain focused on the workplace and the attainment of the OSH Act's vision of cooperative federalism.

Under the Seventh Circuit standard, Illinois is free to license medical personnel.[37] Illinois is free as well to

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Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents, 101 Harv. L. Rev. 535, 542-543 (1987).

[37] The OSHA bloodborne pathogen standard contains several provisions which preserve a variety of state and local laws, so that such laws would never be viewed as directly, clearly and substantially affecting the federal scheme. *See, e.g.*, 56 Fed. Reg. 64,004, 64,147 (1991) (permitting disposal of regulated waste in accordance with applicable federal, state and local regulations); 56 Fed. Reg. 64,004, 64,154 (1991) (recognizing state accreditation of laboratories); 56 Fed. Reg. 64,004, 64,157-64,158, 64,179 (1991)

license electricians and enact local electrical codes.[38] Illinois may even establish detailed certification standards for hazardous waste workers as part of a comprehensive program for the regulation of occupational safety and health upon approval by the Secretary of a state plan filed pursuant to Section 18(b) of the OSH Act. Illinois, however, has declined to follow the procedure designed by Congress for doing so. Illinois is therefore not free under the OSH Act and the United States Constitution to adopt the contested provisions of the Illinois Acts.[39]

(respecting confidentiality-of-source provisions of state or local law); 56 Fed. Reg. 64,004, 64,170 (1991) ("This standard does not abridge, enlarge, or alter any existing ethical or statutory code [with respect to confidentiality of medical records].")

[38] In the preamble to the revision of its Part S Electrical Standards, OSHA describes the National Electrical Code ("NEC") as "the cornerstone of electrical safety in the United States," providing "important assistance to OSHA in its mission to afford electrical safety in the workplace." 46 Fed. Reg. 4034, 4036 (1981); *see also* 29 C.F.R. § 1910-301-1910.441. The same preamble explains that the 1981 revisions "streamlined the existing standard, which incorporated by reference the whole 1971 NEC, by deleting portions of the NEC which were not directly related to employee safety." 46 Fed. Reg. 4034, 4037 (1981).

[39] Other provisions of the Illinois Acts initially challenged by NSWMA but not ruled upon by the trial judge likely also would not survive application of the Seventh Circuit's test.

CONCLUSION

For all the reasons stated above, NSWMA respectfully submits that the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

U.S. OCCUPATIONAL SAFETY AND HEALTH ACT, 29 U.S.C. §§ 651-658

TITLE 29—LABOR

§ 652. Definitions

* * * *

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

* * * *

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

* * * *

(f) Federal share.

The Federal share for each State grant under subsection (a) or (b) of this section may not exceed 90 per centum of the total cost of the application. In the event the Federal share for all States under either such subsection is not the same, the differences among the States shall be established on the basis of objective criteria.

(g) Administration and enforcement of programs contained in approved State plans; Federal share

The Secretary is authorized to make grants to the States to assist them in administering and enforcing programs for occupational safety and health contained in State plans approved by the Secretary pursuant to section 667 of this title. The Federal share for each State grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (f) of this section shall be applicable in determining the Federal share under this subsection.

* * * *

§ 653. Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected

* * * *

(b)(1) Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies and State agencies acting under section 2021 of title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

* * * *

(4) Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

* * * *

§ 667. State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of

occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

* * * *

(h) Temporary enforcement of State standards

The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, PUBLIC LAW 99-499

Hazardous Waste Operations. Pub.L. 99-499, Title I, § 126(a)-(f), Oct. 17, 1986, 100 Stat. 1690, as amended PubL. 100-202, § 101(f) [Title II], Dec. 22, 1987, 101 Stat. 1329-198, provided that:

"(a) Promulgation.—Within one year after the date of the enactment of this section, the Secretary of Labor shall, pursuant to section 6 of the Occupational Safety and Health Act of 1970, promulgate standards for the health and safety protection of employees engaged in hazardous waste operations.

"(b) Proposed standards.—The Secretary of Labor shall issue proposed regulations on such standards which shall include, but need not be limited to, the following worker protection provisions:

"(1) Site analysis.—Requirements for a formal hazard analysis of the site and development of a site specific plan for worker protection.

"(2) Training.—Requirements for contractors to provide initial and routine training of workers before such workers are permitted to engage in hazardous waste operations which would expose them to toxic substances.

* * * *

"(d) Specific training standards.—

"(1) Offsite instruction; field experience.—Standards promulgated under subsection (a) shall include training standards requiring that general site workers (such as equipment operators, general laborers, and other supervised personnel) engaged in hazardous substance removal or other activities which expose or potentially expose such workers to hazardous substances receive a minimum of 40 hours of initial instruction off the site, and a minimum of three days

of actual field experience under the direct supervision of a trained, experienced supervisor, at the time of assignment. The requirements of the preceding sentence shall not apply to any general site worker who has received the equivalent of such training. Workers who may be exposed to unique or special hazards shall be provided additional training.

"(2) Training of supervisors.—Standards promulgated under subsection (a) shall include training standards requiring that onsite managers and supervisors directly responsible for the hazardous waste operations (such as foremen) receive the same training as general site workers set forth in paragraph (1) of this subsection and at least eight additional hours of specialized training on managing hazardous waste operations. The requirements of the preceeding sentence shall not apply to any person who has received the equivalent of such training.

"(3) Certification; enforcement.—Such training standards shall contain provisions for certifying that general site workers, onsite managers, and supervisors have received the specified training and shall prohibit any individual who has not received the specified training from engaging in hazardous waste operations covered by the standard. The certification procedures shall be no less comprehensive than those adopted by the Environmental Protection Agency in its Model Accreditation Plan for Asbestos Abatement Training as required under the Asbestos Hazard Emergency Response Act of 1886 [Pub. L. 99-519].

"(4) Training of emergency response personnel.—Such training standards shall set forth requirements for the training of workers who are responsible for responding to hazardous emergency situations who may be exposed to toxic substances in carrying out their responsibilities.

"(e) Interim regulations.—The Secretary of Labor shall issue interim final regulations under this section within 60 days after the enactment of this section which shall provide no less protection under this section for workers employed by contractors and emergency response workers than the protections contained in the Environmental Protection Agency Manual (1981) "Health and Safety Requirements for Employees Engaged in Field Activities" and existing standards under the Occupational Safety and Health Act of 1970 found in subpart C of part 1926 of title 29 of the Code of Federal Regulations. Such interim final regulations shall take effect upon issuance and shall apply until final regulations become effective under subsection (c).

"(f) Coverage of certain State and local employees.—Not later than 90 days after the promulgation of final regulations under subsection (a), the Administrator shall promulgate standards identical to those promulgated by the Secretary of Labor under subsection (a). Standards promulgated under this subsection shall apply to employees of State and local governments in each State which does not have in effect an approved State plan under section 18 of the Occupational Safety and Health Act of 1970 providing for standards for the health and safety protection of employees engaged in hazardous waste operations."

* * * *

PROPOSED OCCUPATIONAL HEALTH AND SAFETY ACT OF 1970

S. 2788, 91ST CONGRESS, 1ST SESSION

FEDERAL-STATE RELATIONSHIP

SEC. 14 * * *

* * * *

(b) (1) No State safety or health standard in effect upon the effective date of this Act or which may become effective thereafter, shall be superseded by any standard promulgated under this Act except insofar as such State safety or health standard is in conflict with this Act.

(2) Any State safety or health standard in effect upon the effective date of this Act, or which may become effective thereafter, which affords employees significantly greater protection than a safety or health standard promulgated under this Act shall not thereby be construed or held to be in conflict.

(c) Any State which, at any time, desires to assume responsibility for development and enforcement in such State of occupational safety or health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 4 shall submit a State plan for the development of such standards and their enforcement.

* * * *

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, PUBLIC LAW 91-173

EFFECT ON STATE LAWS

SEC. 506. (a) No State law in effect on the date of enactment of this Act or which may become effective thereafter shall be superseded by any provision of this Act or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this Act or with any order issued or any mandatory health or safety standard.

(b) The provisions of any State law or regulation in effect upon the operative date of this Act, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal mines than do the provisions of this Act or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this Act. The provisions of any State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, which provide for health and safety standards applicable to coal mines for which no provision is contained in this Act or in any order issued or any mandatory health or safety standard, shall not be held to be in conflict with this Act.

FEDERAL METAL AND NONMETALLIC MINE SAFETY ACT, PUBLIC LAW 89-577

STATE PLANS

SEC. 16. (a) In order to promote sound and effective coordination in Federal and State activities within the field covered by this Act, the Secretary shall cooperate with the official mine inspection or safety agencies of the several States.

(b) Any State which, at any time, desires to develop and enforce health and safety standards in mines located in the State which are subject to this Act shall submit, through a State mine inspection or safety agency, a State plan for the development of such standards and their enforcement.

* * * *

EFFECT ON STATE LAWS

SEC. 19. (a) No State or territorial law in effect upon the effective date of this Act or which may become effective therafter, shall be superseded by any provision of this Act, except insofar as such State or territorial law is in conflict with this Act, or with orders issued pursuant to this Act.

(b) Provisions in any State or territorial law in effect upon the effective date of this Act, or which may become effective thereafter, which provide for greater safety of persons in a mine as defined in this Act, than do provisions of this Act, which relate to the same phase of such operations, shall not be construed or held to be in conflict with this Act. Provisions in any State or territorial law in effect upon the effective date of this Act, or which may become effective thereafter, which provide for the safety of persons in a mine as defined in this Act concerning which no provision is contained in this Act, shall not be construed or held to be superseded by this Act.

* * * *

29 C.F.R. § 1910.120 Hazardous waste operations and emergency response.

* * * *

(3) *Definitions*—"*Buddy system* means a system of organizing employees into work groups in such a manner that each employee of the work group is designated to be observed by at least one other employee in the work group. The purpose of the buddy system is to provide rapid assistance to employees in the event of an emergency.

* * * *

(e) *Training*—(1) *General.* (i) All employees working on site (such as but not limited to equipment operators, general laborers and others) exposed to hazardous substances, health hazards, or safety hazards and their supervisors and management responsible for the site shall receive training meeting the requirements of this paragraph before they are permitted to engage in hazardous waste operations that could expose them to hazardous substances, safety, or health hazards, and they shall receive review training as specified in this paragraph.

(ii) Employees shall not be permitted to participate in or supervise field activities until they have been trained to a level required by their job function and responsibility.

(2) *Elements to be covered.* The training shall thoroughly cover the following:

(i) Names of personnel and alternates responsible for site safety and health;

(ii) Safety, health and other hazards present on the site;

(iii) Use of personal protective equipment;

(iv) Work practices by which the employee can minimize risks from hazards;

* * * *

(3) *Initial training.* (i) General site workers (such as equipment operators, general laborers and supervisory personnel) engaged in hazardous substance removal or other activities which expose or potentially expose workers to hazardous substances and health hazards shall receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience under the direct supervsion of a trained, experienced supervisor.

(ii) Workers on site only occasionally for a specific limited task (such as, but not limited to, ground water monitoring, land surveying, or geo-physical surveying) and who are unlikely to be exposed over permissible exposure limits and published exposure limits shall receive a minimum of 24 hours of instruction off the site, and the minimum of one day actual field experience under the direct supervision of a trained, experienced supervisor.

(iii) Workers regularly on site who work in areas which have been monitored and fully characterized indicating that exposures are under permissible exposure limits and published exposure limits where respirators are not necessary, and the characterization indicates that there are no health hazards or the possibility of an emergency developing, shall receive a minimum of 24 hours of instruction off the site and the minimum of one day actual field experience under the direct supervision of a trained, experienced supervisor.

(iv) Workers with 24 hours of training who are covered by paragraphs (e)(3)(ii) and (e)(3)(iii) of this section, and who become general site workers or who are required to wear respirators, shall have the additional 16 hours and two days of training necessary to total the training specified in paragraph (e)(3)(i).

(4) *Management and supervisor training.* On-site management and supervisors directly responsible for, or who supervise employees engaged in, hazardous waste operations shall receive 40 hours initial training, and three

days of supervised field experience (the training may be reduced to 24 hours and one day if the only area of their responsibility is employees covered by paragraphs (e)(3)(ii) and (e)(3)(iii)) and at least eight additional hours of specialized training at the time of job assignment on such topics as, but not limited to, the employer's safety and health program and the associated employee training program, personal protective equipment program, spill containment program, and health hazard monitoring procedure and techniques.

* * * *

(9) *Equivalent training.* Employers who can show by documentation or certification that an employee's work experience and/or training has resulted in training equivalent to that training required in paragraphs (e)(1) through (e)(4) of this section shall not be required to provide the initial training requirements of those paragraphs to such employees and shall provide a copy of the certification or documentation to the employee upon request. However, certified employees or employees with equivalent training new to a site shall receive appropriate, site specific training before site entry and have appropriate supervised field experience at the new site. Equivalent training includes any academic training or the training that existing employees might have already received from actual hazardous waste site work experience.

* * * *

Hazardous Waste Operations & Emergency Response
Final Rule
54 Fed. Reg. 9294, 9315-9316

IX. Federalism

This final regulation has been reviewed in accordance with Executive Order 12612 (52 FR 41685; October 30, 1987) regarding Federalism. Executive Order 12612 requires that agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions that would restrict state policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. The Executive Order provides for preemption of state law only if there is a clear Congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

During the development of this rule, OSHA has, to the extent possible, refrained from limiting state policy options by developing a rule that permits flexibility on the part of the States through the use of performance language. We have also consulted with the States, in particular those states with approved state OSHA plans, during the public hearings and comment period called for in the notice of proposed rulemaking for this rule. We will continue to work with the States that have state occupational safety and health plans approved under section 18 of the OSHA Act to encourage those states to develop their own policies to achieve program objectives and continue to work with appropriate state officials as they present their state standards for approval.

This rulemaking is directed by Congress under the Superfund Amendments and Reauthorization Act of 1986 (SARA). The Constitutional authority and Congressional intent for Federal action in the area of worker protection standards for employees engaged in hazardous waste operations is mandated clearly in section 126 of SARA.

Congress therefore has identified the protection of employees engaged in hazardous waste operations and emergency response as a problem of national scope through the enactment of SARA.

Section 18 of the Occupational Safety and Health Act (OSH Act), permits any state to develop its own independent state occupational safety and health program. Any state may develop and submit to OSHA, for approval and use, a state occupational safety and health program that provides, among other things, worker protection "at least as effective as" that protection provided under the Federal program.

With respect to Section 4 of Executive Order 12612, Section 18 of the OSH Act also expresses Congress' clear intent to preempt state laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards. Under the OSH Act, a state can avoid preemption only if it submits, and obtains Federal OSHA approval of, a plan for the development of such standards and their enforcement as mentioned above. Occupational safety and health standards developed by such approved Plan-States must, among other things, be as least as effective in providing safe and healthful employment and places of employment as the Federal standards.

OSHA has used its regulatory preemption of State law to the minimum level necessary to achieve the objectives of the OSH Act and section 126 of SARA.

Section 126 of SARA, under paragraph (f), requires that the U.S. Environmental Protection Agency (EPA) provide those state and local government workers who are not covered by the protections of approved OSHA state plans with protection that is identical to that provided under the Federal OSHA standards. Non-state and local government employees would be regulated by the Federal OSHA standard. State and local government

workers, employed in 25 non-OSHA state plan states, would not normally be covered by standards promulgated under Federal OSHA or approved state OSHA programs. OSHA has worked with EPA in the development of this final rule to assure that the protections provided to all state and local government employees is consistent with that provided by the Federal OSHA standard and the OSH Act. EPA as the regulatory authority for the non-OSHA state plan states will address their actions with respect to worker protection policies that have federalism implications in their rulemaking.

This final rule is written so that employees engaged in hazardous waste operations and related emergency response operations in every state, including those state and local government employees in states regulated by EPA, would be protected by general, performance oriented standards. To the extent that there are state or regional peculiarities caused by the types of hazardous waste operations, including the types of related emergency response provided, states with occupational safety and health plans approved by OSHA under section 18 of the OSH Act would be able to develop their own state standards to address any special problems. This would assure the compatibility of state or local emergency response plans developed independently by state or local emergency planning committees under Title III of SARA with Federal worker protection standards issued by OSHA and EPA.

And, under the OSH Act, if a state develops its own OSHA approved state program, it could make additional requirements in its standards. States that will be covered by regulations issued by EPA under paragraph 126(f) of SARA will be provided the same option. Moreover, the performance nature of this final rule, of and by itself, allows for flexibility by states and owners or operators of hazardous wastes sites or providers of emergency response to provide as much safety as pos-

sible using varying methods consonant with the conditions in each state.

In summary, there is a clear national problem, identified by Congress, related to occupational safety and health in hazardous waste operations and related emergency response. While the individual states, if all acted collectively, might be able to deal with the safety problems involved, most have not elected to do so in the seventeen years since the enactment of the OSH Act. Those states which have elected to participate under section 18 of the OSH Act, would not be preempted by this final regulation and would be able to address special, local conditions within the framework provided by this performance oriented standard while ensuring that their standards are at least as effective as the Federal standard. State comments were invited on the proposal and those that were submitted to the record were fully considered prior to promulgation of this Final Rule.

The agency certifies that this document has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of Executive Order 12621. There are no provisions of this rulemaking that are inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of Executive Order 12621. States which have approved state occupational safety and health plans may incur additional costs associated with standards development and enforcement as a result of this rulemaking. Funding for these approved state plan programs is available from OSHA under section 18 of the OSH Act. This rulemaking would not change the State's ability to discharge traditional State governmental functions or other aspects of State sovereignty.

STATE OF ILLINOIS
85TH GENERAL ASSEMBLY
HOUSE OF REPRESENTATIVES
TRANSCRIPTION DEBATE—CERTIFIED

[STATE SEAL]

State of Illinois
Executive Department

CERTIFICATE

To All To Whom These Presents Shall Come, Greeting:

I, GEORGE H. RYAN, Secretary of State of the State of Illinois, do hereby certify that the attached is a true copy of debate on H.B. 3100 (P.A. 85-1195) in the House on April 27, May 10, June 23 and July 1 and in the Senate on June 14, June 15, June 27 and July 1.

[SEAL]

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield, February 21, 1992.

/s/ George H. Ryan
Secretary of State

127 Legislative Day July 1, 1988

* * * *

Speaker McPike: "Representative Mays to close. Representative Leverenz to close. Representative Leverenz to close."

Leverenz: "On . . . House Bill 3205, I now move that the First Conference Committee Report be adopted inasmuch as it was adopted in the Senate who has the same concern by a vote of 57 to 0."

Speaker McPike: "Question is, 'Shall the House adopt the First Conference Committee Report to House Bill 3205?' All those in favor vote 'aye', opposed vote 'no'. Have all voted? Have all voted? Have all voted who wish? Clerk will take the record. On this Motion there are 107 'ayes' 5 'nos', and 1 voting 'present'. The House does adopt First Conference Committe Report to House Bill 3205. And this Bill having received the required three fifths Constitutional Majority is hereby declared passed. House Calendar Supplemental # 3, appears House Bill 3100, Representative Breslin."

Breslin: "Thank you, Mr. Speaker, Ladies and Gentlemen. I rise to inform the Body that we have been able to reach an agreement with regard to tipping fees in order to secure funding for the hazardous waste disposal fund for both the State and Local Government. The agreement is contained in House Bill 3100. The following are the highlights of that agreement. First of all, it has been agreed that there will be a cap of seventy cents on the DuPage County Forest Preserve District that landfills that are currently in existence. There are two. It is also agreed that the language in this Bill with regard to this issue will have no effect on the current suit dealing with the Constitutionality challenging the Constitu-

tionality of that DuPage County seventy cent tax. The second part of the agreement is that the states surcharge, tipping fee, shall be sixty cents for the next three years and then it will drop down to forty five cents. That will generate for the State of Illinois, approximately sixteen million dollars for the first three years and then will drop down to about twelve million dollars thereafter. For the locals, the surcharge will be forty-five cents for the first three years and then will go up to sixty cents. The reason for this change is and for the flipping of the fees between the state and the locals is because at the beginning of this process, the State will have the major responsibility for helping locals in giving planning grants so the state is going to need more money. After three years pass, the locals are going to be ready to start implementing their plans. They are going to need money to buy landfill space. They are going to need money in order to start their incinerator to start their recycling programs etc. So, we want to encourage implementation after this point. The Bill refers to waste which is permanently disposed of in landfills, not just that which is transferred. A local unit of Government is defined in the Act as that which is defined under the Local Solid Waste Disposal Act and it must be located, the facility must be . . . the charge can be placed only where the disposal facility is located. It should be noted that there are three units of Local Government which could impose this tax. The county in which it is located, the municipality in which it is located or a joint action agency. It is up to the local communities to decide how and what they will charge. The cap, however, is that it can not exceed forty five cents for the next three years and sixty cents thereafter. So it is possible, that should you have a municipal landfill in a municipality. The Municipality may decide to charge twenty cents and the county twenty

five cents, and that will get them up to their forty five cents. It is left in this Bill up to those individual entities to make the determination. The Bill also addresses the Constitutional questions that previously held the previous Bill unconstitutional. Last but not least, there is an additional provision in the Bill which establishes a licensing system for crane operators and for laborers who work with hazardous waste materials only. The purpose of this licensing requirement is to promote job safety and to protect the life and health of our citizens. I don't know if you realize that, but I became familiar with this issue when I was working on the hazardous—on the household hazardous waste issue. We, as you know last year passed a Bill that would require—or allow municipalities to establish local collection programs for their household hazardous waste. And it came to my attention that this was a very tricky issue because we were having people who were untrained in the handling of hazardous materials, actually going out and doing the collecting. It was a concern with regard to liability and it was a concern with regard to the EPA and ENR as to how they should be maintained. We did build into that system, a requirement that EPA and ENR set the operating standards for such collection programs and we had to exempt people from liability under. Well here are laborers and crane operators, citizens of our state, taxpayers of our state who can be put in hazardous positions, handling hazardous waste material removal and clean up, with no training whatsoever. This Bill would establish a licensing procedure for both. I have—I stand ready to answer any question that you might have and I move for the adoption of the First Conference Committee Report on House Bill 3100."

Speaker McPike: "You've heard the Lady's Motion, and on that Representative Wennlund."

Wennlund: "Thank you, Mr. Speaker, Ladies and Gentlemen of the House. I rise in support of House Bill 3100. The State of Illinois can no longer wait to implement tipping fees to fund recycling programs in Illinois, composting programs in Illinois and waste reduction in Illinois. The barge will not leave the State of Illinois, its got to be dealt with now. The time is now. I realize that some of the provisions with respect to the crane operators licensing may be somewhat offensive, but as Representative Breslin said, they are limited to only hazardous waste. These are the people who drive the bulldozers and the cranes wearing white and yellow uniforms with masks on. That's all there is to it. We cannot afford to vote 'no' on this issue and see another New Jersey or New York barge be rejected. The time is now in Illinois, recycling is now in Illinois, composting is now in Illinois, reduction of solid waste is now in Illinois and the only way it's going to get funded is through this mechanism. It has been agreed to by all parties with respect to the fees, DuPage County Forest Preserve District is taken care of. Everything is in place, we can no longer wait. I strongly urge a 'yes' vote even if you have to hold your nose with respect to the crane operators. But remember it's only those operators dealing with hazardous waste, the time is now, I urge all my colleagues on both sides of the aisle, please vote 'yes' on this issue and let's get it out and get it implemented."

Speaker McPike: "Representative Didrickson."

Didrickson: "Thank you, Mr. Speaker, would the Sponsor yield for some questions please?"

Speaker McPike: "Yes she will."

Didrickson: "Representative Breslin, the statement has been made that there is some very fine and good aspects to this Bill and the time has come and I

may concur on that. But there are also a number of us that are concerned about the licensure crane operators. Why at the twelfth hour has this been put into the Conference Committee Report? Has there been a Bill going through the system, this legislative year or has there been public debate on this particular licensure of crane operators?"

Breslin: "There was public debate on this issue earlier in the House in this Session. At that time, the Bill as considered was poorly drafted. there were not a lot of details worked out on it between the various opposing parties and it was defeated in the House Committee. Since that time, a great number of meetings have taken place. The language has been cleaned up dramatically and a number of compromises have been reached. So the Bill that comes to you today is much improved over that which failed in House Committee earlier this year."

Didrickson: "The second question that I would have for those that are concerned about the licensure of the crane operators is the fact that you're licensing the big crane operators, but what about the smaller lift crane operators? Why are you excluding them?"

Breslin: "It is my understanding that the type of crane that is used in the removal of hazardous waste applies to the larger crane. And we did not intend to include the forklift or the bobcat, the thing that—runs around the average manufacturing plant, we wanted to confine it only to the large crane that is typically used in this process and so this restriction was put in, I believe in order to satisfy the concerns of the business community of this state."

Didrickson: "Well, it's my understanding that the language you have here has been drafted so broadly that it does not do what you just said and so that's the line of my questioning here and that indeed it is so

broad that there is concern now that you are also going to be licensing cleaning ladies at these plants because of the overly broad language."

Breslin: "I disagree. This is a strict construction for the definition for crane, hoist, laborer, hazardous waste and the facility in which this applies. In addition to that, there are several exemptions. The following are those exemptions. Operators of forklifts or bobcats. Operators of graining . . . grading, drainage, field tile and irrigation equipment. Operators of agricultural farming equipment. Persons involved in activities associated with the excavation for discovery, development or production of minerals, coals or other substances and oil, gas and water. Employees of a railroad who operate a crane or a hoist. And any employee of the owner, operator or principal responsible party of the manufacturing facility undergoing cleanup providing the employee has undergone the required training by OSHA, hazardous waste operations."

Didrickson: "I think you just mentioned the fact that it also requires those regarding clean up is that correct?"

Breslin: "It exempts any employee of the owner, operator or principal responsible party of manufacturing facilities undergoing cleanup provided the employee has had some training under the OSHA hazardous waste operations. I just gave you an exemption not an inclusion."

Didrickson: "Well . . . what you're saying and reading into the record here is correct. I just would like to caution for those who are concerned about the licensure of crane operators and the potential future licensure of the trades, which is really what we're opening the door for here, that this has been drafted as I am told very broadly and that will include what

it is that you are saying it doesn't. I hope you're correct. I just want to raise the flag on that and express those concerns of the business community."

Speaker McPike: "Representative McCracken."

McCracken: "Thank you, Mr. Speaker, I move the previous question."

Speaker McPike: "The Gentleman moves the previous question. The question is, 'Shall the previous question be put?' All those in favor say 'aye', opposed 'no', the 'ayes' have it and the previous question is put. Representative Breslin to close."

Breslin: "I repeat, Ladies and Gentlemen, this is the tipping fee Bill. It has the agreement of DuPage County, the City of Chicago, downstate, ENR, the EPA, the Environmental Community. It has the support of laborers and the trades people and the crane operators, so I ask for adoption of the First Conference Committee Report."

Speaker McPike: "The Lady moves for the adoption of the report. The question is, 'Shall the House adopt the Conference Committee Report to House Bill 3100? All in favor vote 'aye', opposed 'no'. Have all voted? Have all voted who wish? Representative Hultgren, did you wish to explain your 'no' vote?"

Hutlgren: "Yes, if I may."

Speaker McPike: "Proceed sir."

Hultgren: "In the debate, I heard much discussion about the licensing of crane operators. I think omitted from the discussion, at least from the question and answer, apparently the provision also licenses laborers and if that makes a difference to some, just—it would appear that a basic laborer would have to maintain a license under the Conference Committee Report. I wanted to point that out."

Speaker McPike: "Have all voted? Have all voted who wish? The Clerk will take the record. On this Motion there are 95 'ayes', 15 'nos' and 5 voting 'present'. The House does adopt the First Conference Committee Report to House Bill 3100, and this Bill having received the required three fifths Constitutional Majority is hereby declared passed. The vote has been taken and the Bill has been declared passed. If someone wishes to add, they can be journalized. The Clerk has a mechanical problem with this roll, we will dump the Roll Call and vote again. Question is, 'Shall the House adopt the First Conference Committee Report to House Bill 3100? All those in favor vote 'aye', opposed vote 'no'. Have all voted? Have all voted who wish? Clerk will take the record. Representative Dunn would like to change from 'aye' to 'no'. Mr. Dunn from 'aye' to 'no'. On this Motion there are 91 'ayes', 16 'nos' and 8 voting 'present'. The House does adopt the First Conference Committee Report to House Bill 3100, and this Bill having received the required three fifths Constitutional Majority is hereby declared passed. Turning to Supplemental # 2, House Bill 3227, Representative Mays, Mr. Mays."

Mays: "Thank you very much, Mr. Speaker, Ladies and Gentlemen of the House. This is the operations and new appropriations for the Department of Transportation spends a billion, nine hundred and twenty million, six hundred and seventeen thousand total of which nineteen million, eight hundred and sixty five thousand, six hundred dollars is general funds. I would move for adoption of the Conference Committee Report."

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STATE OF ILLINOIS
85TH GENERAL ASSEMBLY
SENATE
TRANSCRIPTION DEBATE—CERTIFIED

* * * *

PRESIDENT :

Senator Savickas.

SENATOR SAVICKAS:

Yes, the amendment did not even bring the cost into it. The amendment just was put on primarily so that it can go into a conference committee and then the cost would be put on. That is not happening, so we'll remove it, let it go out and let them work on it next . . . Session.

PRESIDENT:

Further discussion? Further discussion? If not, the question is, shall the Senate recede from Senate Amendment No. 1 to House Bill 849. Those in favor will vote Aye. Opposed vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, there are 55 Ayes, no Nays, none voting Present. The Senate does recede from Amendment—Senate Amendment No. 1 to House Bill 849 and the bill having received the required constitutional majority is declared passed. Now, on page 7—Senator Smith, for what purpose do you arise?

SENATOR SMITH:

Would you be kind and register me as voting Aye on that, please? I'm so sorry.

PRESIDENT:

All right, the record will so reflect. Middle of page 7, ladies and gentlemen. We'll go right through the Conference Committee Reports as filed, then we will go to

the Order of Secretary's Desk Resolutions and by then, I hope, we will have a supplemental Calendar to address. On the Order of Conference Committee Reports, Madam Secretary, the Conference Committee Report on House Bill 3100.

SECRETARY:

First Conference Committee Report on House Bill 3100.

PRESIDENT:

Senator Welch.

SENATOR WELCH:

Thank you, Mr. President. The Conference Committee Report on House Bill 3100 reflects initially an agreement that has been worked out over two years. As many of you recall, the Solid Waste Management Act was declared unconstitutional in 1987 because the court decided that money was collected without regard to discretion as to categories that were included or excluded. This bill now reaches an agreement between the major parties who were involved. There is only one group, a waste disposal industry, that is opposed to this part of that bill. In addition to that, this also enacts a bill . . . legislation that will create the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act. Let me explain the part of the bill that affects the settlement between DuPage County, Cook County and the rest of the state to reenact the Solid Waste Management Act. The major dispute between the party was the cap on disposal fees. DuPage County had raised their fees to seventy cents per cubic yard. This bill agrees to let them keep collecting that money at seventy cents per cubic yard. Other local units of government will collect forty-five cents per cubic yard, the state will collect forty-five cents per cubic yard. In 1992, the local rate will go up to sixty cents while the state rate goes downward. The city, DuPage

County, the Environmental Protection Agency, the environment . . . E and R and other environmental groups have signed off on this particular report. The bill also creates and requires operators of a crane or hoist driven by any power when used in lowering or hoisting personnel or materials involving disposal, clean up or handling of hazardous materials only to have a license issued by the EPA, and the reason . . . one of the major reasons for this is that we have now several sites being cleaned up in the state where out-of-state personnel are coming in. We don't know if they have licenses or what standard is used to license them, they're working in Illinois and we don't know if they're safe or not. I would be glad to try to answer any questions.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Is there discussion? If not, the question is, . . . Senator Donahue, for what purpose do you arise?

SENATOR DONAHUE:

Well, thank you, Mr. President. I have a question about this. I know that there's . . . this is one of those big bills that's got a lot of things in it and I have a . . . a question about the Licensing Act for crane operators. This is something new and I know that many of the business groups are very, very opposed to this, and I'd like to know what . . . why are we doing this at this late stage?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Well, Senator, I'm not sure which business groups you talked to, but there's only one business group and lobbyist who is opposing this, and basically, this is part of the agreement to let DuPage County receive the seventy

cents that they have been collecting for two years. DuPage County is getting a windfall basically in the first part of this bill by being able to keep seventy cents. The second part of the bill is added to it.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Oh, I beg your pardon, Senator Welch . . . Senator Donahue.

SENATOR DONAHUE:

I'm . . . I'm not addressing that part, Senator Welch. I'm talking about the licensing of crane operators, and from what I understand, there are numerous lobbyists and organizations that are very concerned about this legislation or that portion of it, not the first part but the first. . .

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Senator, let me . . . let me try to clarify. On page 3 of the report, there's a paragraph added at the request and . . . insistence of many of those lobbyists you are talking about, and what it does is it restricts the Act and says this Act does not apply to any employee of the owner, operator or principal responsible party of a manufacturing facility undergoing cleanup pursuant to CROLA or the Environmental Protection Act. This was one of their major objections and . . . and was inserted at their request. At this point, most of the opposition has been reduced. I'm not saying it's totally removed, Senator, but most of it has been reduced.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Donahue.

SENATOR DONAHUE:

Well, I would just say that I realize that it's very limited in scope and it's . . . very limited, but this is an opening of a door next year and the year after and I oppose this part of the legislation.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator . . . Senator Maitland.

SENATOR MAITLAND:

Thank you, Mr. President and members of the Senate. A. . . a question of the sponsor if he'll . . . he'll yield.

PRESIDING OFFICER: (Senator DEMUZIO)

Indicates he will yield. Senator Maitland.

SENATOR MAITLAND:

Senator, what you've told us who . . . who isn't included. Who . . . who really then is included as. . . as a crane operator? What crane operators are now included?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Well, it involves two unions, one is the operating engineers; number two is the . . . the laborers locals and the requirement is that they have to be working at a hazardous waste site dealing with hazardous waste material. It doesn't apply to the crane operator across the street, for instance, working on the library. Has to be hazardous waste that they're dealing with and they're operating a crane, lifting it up or moving it down which . . . which could be dangerous.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Maitland.

SENATOR MAITLAND:

Well, I . . . I guess I don't speak this language very well but . . . but . . .again, I guess, it begs the question, why then . . . why are we licensing these people? What's the . . . what's the concern here and who's going to oversee the licensing? Is there . . . is there some standard here or something that we . . . going to abide by?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

The licensing will be done by the Environmental Protection Agency, and let me give you a specific instance of why this is necessary. In order to get a license in Illinois, you have to have forty . . . at least forty hours of training dealing with hazardous materials, hazardous waste. In LaSalle, Illinois, we have a superfund site. Now that the federal government has come in with their superfund to clean it up, you or I cannot get on that site. We . . . unless we have forty hours of training because it's so dangerous . . . the PCB's are in the air, they're on the ground. If you . . . If you get involved with them it could be . . . causing diseases. The reason we're doing this is this, the state led a contract to clean up that site. Westinghouse got the contract. They have a subsidiary from Georgia. They brought in workers who are working on this site. They have not met any standards of Illinois as far as the forty hours of training to be on that site and, frankly, we're not sure what kind of training they have. In some states, they show them a two-hour film of how to work on hazardous waste sites. In Illinois, you've got a forty-hour program run by these two unions

that practically anybody could go to, and they've invited me to attend . . . matter of fact, to find out what it's like. But the reason we're doing this is to make sure that the workers on that site are protected. They're working in Illinois and possibly could sue Illinois. Number two, we want to make sure that the pepole who are on there are trained to handle it, because what they are doing is they are going up and down the streets of LaSalle, going into residential homes and cleaning them, they're going and scraping the yards and we want to make sure they know what they're doing. We don't want some fly-by-night operation doing that. So, the idea is that if the EPA license them and make sure that they've taken at least a forty-hour course, not only will the employees be protected but the residents where the cleanup take . . . takes place are protected as well.

PRESIDING OFFICER: (SENATOR DEMUZIO)

All right, further discussion? Senator Maitland.

SENATOR MAITLAND:

(Machine cutoff) . . . just in conclusion, Mr. President. Senator, this may well be the right thing to do. I . . . I really don't know, but I . . . I really, I guess, . . . has this been before us before this year . . . have we ever had this before us?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator . . . Senator Welch.

SENATOR WELCH:

No, I don't believe so, Senator.

PRESIDING OFFICER: (SENATOR DEMUZIO)

. . . Senator Maitland.

SENATOR MAITLAND:

(Machine cutoff) . . . then, finally, in . . . in conclusion. This . . . I . . . I just think, Senator, maybe you ought to do something . . . we ought to come back with . . . next year and . . . and deal with in committee and find out if it, indeed, is the right thing to do and then deal with it then. I . . . I would suggest we perhaps reject this report and come back with a second conference committee.

PRESIDING OFFICER: (SENATOR DEMUZIO)

All right, further discussion? Senator Poshard.

SENATOR POSHARD:

Thank you, Mr. President and Ladies and Gentlemen of the Senate. I rise in strong support of this bill and in particular the part . . . authorizing crane operators or certifying crane operators and laborers in this area of toxic waste cleanup. It's a very dangerous business. It's not a business that we should let just any fly-by-night operation come in without any training or any background in . . . in working in this area. The operating engineers, the laborers have very specific training programs to put their people through the necessary background and training to handle these kinds of materials, and I don't think there's anything wrong in making sure that we put people on the job who can do this and do it right. We're talking about in some cases here life and death issues. So, I rise in strong support of the . . . the bill and in particular this part of the bill. I think it strengthens the bill.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator Geo-Karis.

SENATOR GEO-KARIS:

Mr. President, will the sponsor yield for a question?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Sponsor indicates he will yield. Senator Geo-Karis.

SENATOR GEO-KARIS:

Senator, in my district, the North Shore Sanitary District currently purchases fly ash from public utilities which it mixes with its sludge before replacement in its own landfill. Mixing fly ash with sludge is environmentally beneficial and saves space for more dumping. Am I correct that this use of . . . fly ash by the North Shore Sanitary District in its landfill is not subject to either the state or local fee referred to in your bill?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Senator, that was the question you were supposed to ask on the bill I had yesterday, on Senate Bill 1860, and . . . and the answer to that question was supposed to be yes, that's what the EPA has said, but . . . but you're asking the question on the wrong bill.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further . . . Senator Geo-Karis.

SENATOR GEO-KARIS:

Well, I was told it was on this bill. That's why I'm asking you, Senator. Okay.

PRESIDING OFFICER: (SENATOR DEMUZIO)

All right, further discussion? Senator . . . I'm sorry, Senator Macdonald.

SENATOR MACDONALD:

Thank you, Mr. President. I merely want to echo what some of my colleagues have said about this licensing of

crane operators. I . . . I think that we have introduced this aspect of this bill very late in time and I think that it is going to start a precedent and I think it's only the foot in the door and I . . . I . . . I really have to rise in opposition to that aspect of the bill. I think the . . . the rest of the bill is fine as it is now but I . . . I do have a problem with the licensing of crane operators.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator Brookins.

SENATOR BROOKINS:

Thank you, Mr. President. Will the sponsor yield?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Sponsor indicates he will yield. Senator Brookins.

SENATOR BROOKINS:

How do you become qualified to . . . to . . . to get licensed as a crane operator under this bill?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Well, there are five criteria, basically, Senator. Number one, you have to be eighteen years of age. You have to obtain a certified record of forty hours or more of training to work with hazardous material, training that's approved by the EPA, state or federal. Number 3, you have to have operated equipment and hazardous material handling for a minimum of four thousand hours. Five . . . or four, pass an authorized EPA written examination and, five, not been in violation of operators' guidelines.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Brookins.

SENATOR BROOKINS:

Who gives this training?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

There are two training classes, I understand, one run by the operating engineers and one run by the laborers union.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Brookins.

SENATOR BROOKINS:

So, if I have a young person living in my district somewhere, I can send them out to that school and they'll train them at . . . it's a public school? How do you get in the school?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

I assume so, Senator. I don't know if they have to be a member of that union or not. I don't handle much union legislation to tell you the truth. I . . . they invited me to attend the school, so maybe the answer should be yes.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Brookins.

SENATOR BROOKINS:

Well, to the bill, Mr. President. I can envision that we will be licensing people that cannot obtain the qualifications because it seems as though it's a closed operation; that means that people from my district cannot receive this training and if they cannot receive this training, they can't get licensed because they will not have the experience, they will not be able to pass the exam or will they be qualified. So, I recommend that we oppose this bill until such time as we can determine how this can be opened up to all and all citizens of the State of Illinois.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator Rock.

SENATOR ROCK:

Thank you, Mr. President and Ladies and Gentlemen of the Senate. I rise in strong support of the First Conference Committee Report on House Bill 3100. I'm sure you'll recall that for about two years around here we've had the proposal before us to afford tipping fees or change in the tipping fees for the County of DuPage as it . . . as . . . in respect to their forest preserve district, and for a long time the City of Chicago had some strong objection. Those objections have been worked out, accommodated, assuaged and the city has withdrawn its objection. In addition to that, we have been discussing for a number of years the licensure of those members of the laborers union and the crane operators who dealt in hazardous waste sites. It is extremely important if we are to retain jobs in Illinois that this provision, in fact, be included. Now the fact of the matter is, this is part of an overall agreement and I would urge the members on this side, in order to facilitate our departure from this fair city, to vote affirmatively for this agreement. There is an agreement. I have agreed that we

would try to be of some help and pass this, and I'm sure you're all aware that thirty-six affirmative votes are required and I would urge an Aye vote.

PRESIDING OFFICER: (SENATOR DEMUZIO)

All right, further discussion? Senator Lechowicz.

SENATOR LECHOWICZ:

Thank you, Mr. President. I have a question as far as on the Conference Committee Report. The report that I have filed on my desk does not have a signature sheet, in fact, it only has twenty-seven pages, and I was wondering how . . . how extensive is this report and who's signed it?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Senator, there are thirty-one pages to the report. Six Democrats signed the report.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Lechowicz.

SENATOR LECHOWICZ:

Well, . . . I'm not the only one that only has twenty-seven pages and I would like to know what happened with the last four pages?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR LECHOWICZ:

. . . my question is now to the Chair, when it was distributed and how come we're short some pages here?

PRESIDING OFFICER: (SENATOR DEMUZIO)

. . . well, I don't know the answer to the second part of your question. I . . . I assume . . . it was distributed this morning. Senator Welch, perhaps you could enlighten us.

SENATOR WELCH:

It . . . it was filed last night and distributed last night, it's my understanding. I don't know where the four pages went to but most of the copies have thirty-one pages.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator Philip.

SENATOR PHILIP:

Thank you, Mr. President and Ladies and Gentlemen of the Senate. I . . . I believe the Conference Committee Report was circulated last night while we were in caucus, that's why there are no Republican signatures. I certainly concur with Senator Rock. We've been working on this for two years. The language has been tightened up and I hope that everybody would vote for it.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator Fawell.

SENATOR FAWELL:

I was just looking at my report and if you will look at page . . . no, . . . wait a minute . . . if you will look at page 18, the next page is twenty-eight, the next page is twenty-nine, the next page is thirty, the next page is thirty-one with the signatures and then you go back to page nineteen. It's just been misstapled together.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? If not, Senator Welch, you may . . . may close.

SENATOR WELCH:

Thank you, Mr. President. This is a major piece of legislation for the environment. . .

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Brookins, for what purpose do you arise?

SENATOR BROOKINS:

We got a report that's half filled. It's . . . it's twenty pages, there's ten pages missing out of this and my point of order is, how can we be intelligent on a bill with . . . with the pages missing out of it and we certainly should know what's them twenty pages and I don't think that under the . . . whatever appropriate rules that this . . . that we can pass a bill like this.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Well, Senator Brookins, it's my understanding that the pages were simply . . . misstapled. The . . . the question is, shall the Senate adopt the First Conference Committee Report on House Bill 3100. Those in favor will vote Aye. Those opposed Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, the Ayes are 49, the Nays are 4, none voting Present. The Senate does adopt the First Conference Committee Report and the bill having received the required constitutional majority . . . majority is declared passed. 3199, Senator Etheredge, 3199? Page 7. House Bill 3216, Senator Berman. Senator Berman on the Floor? Senator Rock, for what . . . what purpose do you arise? Senator Rock.

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